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THE IMPLEMENTATION OF INTERNATIONAL LAW IN THE IRISH LEGAL SYSTEM: THE EFFECT OF EUROPEAN UNION MEMBERSHIP

Thesis Submitted for the Degree of Doctor of Philosophy (Ph.D.)

2011

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SUMMARY

As the competence of the European Union (EU) in the field of international relations has expanded, the role of the EU in the implementation of international obligations has correspondingly increased. This thesis examines the effect of this evolving EU role on the implementation of international law in the Irish legal system.

The method adopted for conducting this examination draws reference from the principal sources of international law. To this end, four main sources are identified: international agreements; customary international law; acts of international organisations (taking the specific case of United Nations Security Council resolutions); and international judicial decisions. Before examining the implementation of each of these sources, in order to provide the necessary context for the study, Chapter 1 sets out the theoretical and international law frameworks of that process and Chapter 2 examines the changing legal framework governing the conduct of international relations in Ireland as a result of the growing role of the EU. In the context of examining the effect of EU membership on the implementation of each of these sources, four steps are undertaken in the individual chapters: first, an introduction to the source in question and the issues arising in its implementation within internal legal systems; secondly, an analysis of the Irish position independently of the EU; thirdly, an analysis of the EU position; fourthly, a conclusion which aims to synthesise the effect of the EU position on the Irish position. The substance of these chapters examines the relevant legal rules, whether they be based in treaty, constitution, statute or case-law. While the amount of literature on many of these issues from an Irish perspective is very limited, thus necessitating a more elaborate articulation of the Irish position, the amount of literature on these issues from an EU perspective is significant.

The thesis has two main findings. First, EU membership has had a strong effect on the implementation of international law in the Irish legal system. While this effect is especially pronounced in the context of international agreements – in respect of which the Irish and EU legal systems adopt very different approaches – it is also evident in respect of the other sources of international law. In particular, where the EU gives effect to norms of international law, those norms frequently enjoy the hierarchically superior status, and direct effect, of EU law within the legal systems of Member States. The effect of this EU role is particularly acute in legal systems from

the dualist tradition such as Ireland. In the case of international agreements, for example, the Irish Constitution excludes an international agreement from having the force of domestic law unless positive legislative action has given it effect. In contrast, the European Treaties, as interpreted by the Courts, provide that such agreements form part of the EU legal order without the need for any act of transposition. Thus, as the EU takes on a greater role in the implementation of international agreements, such agreements form part of the Irish legal system through the EU legal system, notwithstanding any constitutional provision to the contrary. Moreover, the European courts frequently recognise the direct effect of such agreements. As with so many other areas of law, therefore, EU membership has had a radical effect on the implementation of international law in the Irish legal system.

Secondly, the analysis of the process of implementation of international law in the Irish legal system, broadly understood as including the EU legal system, highlights the inadequacies of the leading doctrines of monism and dualism. Because of the changing nature of international law, and the tripartite dimension of the relationship between Member States, the EU and the international legal system, these doctrines serve little useful purpose in explaining the relationship between these three legal systems. In order to better understand some of the features of the process of implementation which have been neglected in the scholarly debate to date, the thesis uses the idea of a 'constitutional space' between the international legal system, on the one hand, and the constitutional systems of the EU and its Member States, on the other. Within this constitutional space, Ireland and now the EU must determine how to give effect to international law while maintaining respect for other core principles of constitutional law. Underlining the political dimension of this space, the thesis observes that the Europeanisation of this space has also in many respects resulted in its legalisation. At the same time, Europeanisation has probably resulted in greater openness on the part of the Irish legal system to international law.

In conclusion, by providing a comprehensive analysis of the process of implementation of international law in the Irish legal system within the increasingly important EU context, and by setting out the broad outline of a new approach for analysing this process, this thesis aims to contribute to a better understanding of that process, which has been almost entirely neglected in Irish scholarship to date.

ACKNOWLEDGMENTS

The research for this thesis was made possible by a number of generous scholarships which I gratefully acknowledge: a Trinity Non-Foundation Scholarship (2005-2008); a Department of Education Easter Week Scholarship (2005-2010); a Trinity College Broad Curriculum Studentship (2007-2008); and a Trinity Trust Travel Grant, which facilitated a research trip to the Lauterpacht Centre at the University of Cambridge in August 2008.

With great sadness, I express my profound appreciation to the late Dr. Gernot Biehler, who acted as my supervisor until his untimely death in September 2009. His generosity, good humour and guidance were invaluable during the formative stages of this thesis. Following Dr. Biehler's death, I was extremely fortunate that Prof. Hilary Biehler agreed to take over as supervisor as the thesis entered its final stages. For all her help over the past year, I express my heartfelt thanks.

At work over the past two years, Judge Mary Laffoy not only tolerated my occasional distraction as a result of this research but also provided a rigorous legal training without which this thesis would be much the poorer. Earlier, in The Hague, Judge Kenneth Keith strengthened my conviction that the interaction between national and international law was a worthwhile avenue of inquiry.

I must also express warm thanks to all my family and friends for their support during what turned out to be a longer process than originally envisaged. In Trinity, I would have been lost without Clíodhna Murphy, former classmate and fellow Ph.D. candidate. Special thanks go to Niamh and Conor, who both provided immense practical assistance during the final stages of this thesis and, just as importantly, invaluable moral support. Finally, without the help and support of my parents, Carmel and Teddy, this thesis would never have been started, let alone finished.

David Fennelly

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AC	Appeals Cases (UK)
CLR	Commonwealth Law Reports (Australia)
ECR	European Court Reports
EHRR	European Human Rights Reports
ICJ Reports	International Court of Justice Reports
IEHC	Irish High Court (Neutral Citation)
IESC	Irish Supreme Court (Neutral Citation)
ILRM	Irish Law Reports Monthly
ILTR	Irish Law Times Reports
IR	Irish Reports
KB	King's Bench Division (England and Wales)
NZLR	New Zealand Law Reports
QB	Queen's Bench Division (England and Wales)
SCR	Supreme Court Reports (Canada)
SC/US	United States Supreme Court
WLR	Weekly Law Reports (UK)

Journals

AJIL	American Journal of International Law
ASIL Proc	American Society of International Law Proceedings
BYBIL	British Yearbook of International Law
CMLR	Common Law Market Review
DULJ	Dublin University Law Journal
EJIL	European Journal of International Law
EJLS	European Journal of Legal Studies
ELRev	European Law Review
EuConst	European Constitutional Law Review
EurLJ	European Law Journal
Fordham ILJ	Fordham International Law Journal
HRLR	Human Rights Law Review
ICLQ	International and Comparative Law Quarterly
ILT	Irish Law Times
Ir Jur	Irish Jurist
JSIJ	Judicial Studies Institute Journal
Jud Rev	Judicial Review
Leiden JIL	Leiden Journal of International Law
Michigan LR	Michigan Law Review
Nordic JIL	Nordic Journal of International Law
NYU JILP	New York University Journal of International Law and Politics
YBEL	Yearbook of European Law
ZaöRV	Zeitschrift für ausländisches öffentliches Recht undVölkerrecht

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SCR	Supreme Court Reports (Canada)
SC/US	United States Supreme Court
WLR	Weekly Law Reports (UK)

Journals

AJIL	American Journal of International Law
ASIL Proc	American Society of International Law Proceedings
BYBIL	British Yearbook of International Law
CMLR	Common Law Market Review
DULJ	Dublin University Law Journal
EJIL	European Journal of International Law
EJLS	European Journal of Legal Studies
ELRev	European Law Review
EuConst	European Constitutional Law Review
EurLJ	European Law Journal
Fordham ILJ	Fordham International Law Journal
HRLR	Human Rights Law Review
ICLQ	International and Comparative Law Quarterly
ILT	Irish Law Times
Ir Jur	Irish Jurist
JSIJ	Judicial Studies Institute Journal
Jud Rev	Judicial Review
Leiden JIL	Leiden Journal of International Law
Michigan LR	Michigan Law Review
Nordic JIL	Nordic Journal of International Law
NYU JILP	New York University Journal of International Law and Politics
YBEL	Yearbook of European Law
ZaöRV	Zeitschrift für ausländisches öffentliches Recht undVölkerrecht

CHAPTER 1.
INTRODUCTION

I. INTRODUCTION

The role of law within the international community has transformed over the last century, radically changing the context within which international relations take place. International law is no longer "the preserve of foreign offices and dominated by the issues of war, peace and diplomacy".[1] This "body of rules which are legally binding on states in their intercourse with each other",[2] now governs vast areas of activity across a diverse range of political, economic, social and environmental spheres, at national, regional and global levels. The increasing importance of international law is not only reflected in States' international relations. It also reaches deep within States' internal legal systems.

In Ireland, international law has long played an important role. Indeed, international law, in the form of the "Treaty", formally the Articles of Agreement for a Treaty between Great Britain and Ireland,[3] marked the foundation of the independent Irish State and of the modern Irish legal system. It was often through acts of international law – whether through specific acts, such as the registration of the Treaty at the League of Nations,[4] or more general developments, such as the establishment of diplomatic relations and participation in international fora – that the newly founded State asserted its independence on the world stage. The Preamble of the Constitution of Ireland, 1937 (the 1937 Constitution) lists the establishment of "concord...with other nations" as one of the State's fundamental objectives. Article 29, entitled 'International Relations', sets out the constitutional position of international law in more depth, providing, *inter alia*, that the State "accepts the generally recognised principles of international law as its rule of conduct in its

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[1] Hurrell, *On Global Order* (Oxford University Press, 2007), at 111.
[2] Jennings and Watts eds, *Oppenheim's International Law* (9th ed, Longman, 1992), at 4.
[3] Articles of Agreement for a Treaty between Great Britain and Ireland (signed 6 December 1921) 27 LNTS 449.
[4] The character of the Articles of Agreement as an international agreement was vigorously affirmed by the new Irish Free State, notwithstanding British protests, through its registration at the League of Nations in accordance with Article 18 of the Covenant. For an account of this controversy, see Harkness, *The Restless Dominion* (New York University Press, 1969), at 57-63 and Kennedy, *Ireland and the League of Nations* (Irish Academic Press, 1996), at 53-71. See also McNair, *The Law of Treaties* (Oxford University Press, 1961), at 182.

relations with other States".[5] The State's international obligations have also been the main source of amendments to the 1937 Constitution, most notably the succession of amendments giving effect to the European Treaties, which thereby constitute an integral part of the State's constitutional framework,[6] and the amendments giving effect to the Good Friday Agreement, a milestone in the movement towards lasting peace in Northern Ireland.[7] Beyond the Constitution, extensive evidence of the State's wide-ranging international obligations is to be found throughout the Irish statute book, of which legislation implementing such obligations is a prominent feature. Furthermore, issues of international law have increasingly received consideration in the jurisprudence of the Irish superior courts.

A survey of recent news provides further evidence of the growing importance of international law in Ireland. In addition to major international issues of the day (such as international conflicts, terrorism, climate change or nuclear proliferation), which raise complex questions of international law for all actors on the international scene, international law has featured prominently in domestic political debate, most obviously in the case of the Lisbon Treaty, broader debates about the European Union, and, in that context, the perennial question of Irish neutrality.[8] Yet the role of international law has also come to the surface across a far broader spectrum of issues of public interest, some of which are recurrent themes while others relate to specific controversies: for example, the impact of WTO negotiations on Irish agriculture;[9] the role of the Irish Defence Forces in international missions such as that in Chad;[10] the continued process of implementing the Good Friday Agreement;[11] the lacunae caused

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[5] Article 29.3.

[6] The Third, Tenth, Eleventh, Eighteenth, Twenty-Sixth and Twentieth-Eighth Amendments to the Constitution gave effect to the European Treaties (respectively, Rome, the SEA, Maastricht, Amsterdam, Nice and Lisbon). The Twenty-Third Amendment allowed the State to ratify the Rome Statute on the International Criminal Court. Other amendments – in particular, the First Amendment (concerned with the definition of a state of war), the Ninth (giving the vote to non-nationals in certain circumstances), the Thirteenth and Fourteenth (relating to abortion information), the Twenty-First (abolition of the death penalty) and the Twenty-Seventh (relating to citizenship) – also involved matters with some degree of international concern or effect.

[7] The Nineteenth Amendment to the Constitution gave effect to the British-Irish Agreement.

[8] See e.g. Smyth 'Neutrality undermined or peacekeeping enhanced', *Irish Times,* 16th May 2008; Taylor, 'Lisbon Campaigners clash on neutrality', *Irish Times*, 25th May 2008. See also Devine, Neither friend nor foe: the Irish position', *Irish Times*, 11th November 2008; Keatinge, O'Broin and Tonra, 'Lisbon will not undermine Irish defence policy', *Irish Times*, 6th December 2008; Devine, 'Lisbon alliance is a step too far', *Irish Times*, 24th December 2008.

[9] See e.g. McConnell, 'Irish farmers welcome trade talks collapse', *Irish Times*, 29th July 2008; Smyth, 'IFA accused of misleading public over trade deal', *Irish Times*, 29th July 2008.

[10] Edwards, 'Cabinet approves transfer of Chad troops to UN mission', *Irish Times,* 10th February 2009.

[11] Taylor, 'Northern Ireland agreement welcomed', *Irish Times,* 18th November 2008.

by the ending of bilateral adoption agreements with States such as Vietnam;[12] the State's commitment to meet UN overseas development aid targets;[13] the effect and legitimacy of double taxation agreements with other States and the problems of tax havens;[14] high profile extradition cases;[15] the possible intervention by the IMF as a result of the global financial crisis;[16] the continuing challenge of immigration in its various guises,[17] as well as the problem of human trafficking;[18] the State's successful invocation of the United Nations Convention on the Law of the Sea in support of its claim for a 200-mile continental shelf and its mooted submission of the longstanding Rockall dispute to the United Nations Commission on the Limits of the Contintental Shelf;[19] the domestic reaction to the invocation of longstanding rules of diplomatic immunity.[20] In all these contexts, and many more, issues of international law have hit the headlines in ways that are directly relevant to the State and its internal legal system. Yet the importance of international law is also to be uncovered in less obvious places. Thus, for instance, the systems of international cooperation in trade, postal services, telecommunications and transport, whether by air, sea, or other means, which is so vital for the Irish economy and society, are based firmly in international law. In addition, the vast and expanding sphere of European Union law has an ever-growing effect on the Irish legal system. More subtly, the fabric of the legal system and wider society – in areas as diverse as family law, housing rights, freedom of expression and the administration of justice generally – has become more

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[12] Coulter, 'Children's alliance seeks urgent ratification of adoption accord', *Irish Times*, 28th September 2009; Coulter, 'Vietnam adoptions remain suspended', *Irish Times*, 25th November 2009.

[13] Fitzgerald, 'Government should increase overseas aid despite downturn, survey shows', *Irish Times,* 7th September 2009; Fitzgerald, 'Cabinet still committed to aid target, says Power', *Irish Times,* 10th September 2009; Taylor, 'Budget cuts overseas aid by €25m', *Irish Times,* 9th December 2009.

[14] Hennessy, 'Clampdown on tax exiles announced in Finance Bill', *Irish Times*, 20th November 2008; Keena, 'Italy was key destination for spouses on road to avoiding tax', *Irish Times,* 25th March 2009.

[15] 'US seeks extradition of Sean Garland', *Irish Times*, 31st January 2009; Gartland, 'Campaign to oppose Garland extradition launched', *Irish Times,* 19th June 2009.

[16] 'IMF sees Irish bailout as unlikely', *Irish Times,* 4th December 2009.

[17] MacCormaic, 'Turning the immigration tide', *Irish Times,* 27th December 2008; MacCormaic, 'More emigrating from Ireland than immigrating for first time in 14 years', *Irish Times,* 23rd September 2009; O'Brien, 'Poll shows hardening of attitude towards immigrants', *Irish Times,* 24th November 2009.

[18] Editorial, 'Human Trafficking', *Irish Times,* 7th August 2009; O'Brien, 'Three men jailed for trafficking into Ireland', *Irish Times,* 3rd December 2009.

[19] 'Dempsey welcomes UN water ruling', *Irish Times,* 4th April 2007; Hennessy, 'Ireland brings Rockall oil and gas claim to UN', *Irish Times*, 1st April 2009.

[20] The most recent examples are the cases of the Vatican in the context of the Committee of Investigation into the Dublin Archdiocese (see Fitzgerald, 'Department rejects call to expel nuncio', *Irish Times*, 1st December 2009) and of a former employee of the South African Embassy (Coulter, 'Protest over ambassador's immunity claim in employment rights dispute', *Irish Times*, 5th November 2009).

and more influenced by international norms, perhaps none more so than the European Convention on Human Rights (ECHR).

The relationship between the international legal system and internal legal systems has traditionally been conceived through two opposing doctrinal lenses, monism and dualism, which will be explored further in Section III of this introduction. In their most basic formulations, monism regards international law and internal law as forming part of a single system of law whereas dualism considers international law and internal law to constitute two separate systems of law. On the basis of Article 29.6 of the 1937 Constitution which requires parliamentary action to give effect to international agreements within Irish law, the Irish legal system has traditionally been classified as dualist in its approach to international law.[21] However, in light of the significant changes which have taken place in the understanding of the implementation of international law in internal legal systems since 1937, it must be asked to what extent this classification continues to provide, if indeed it ever did, a complete or accurate explanation of the position of international law in the Irish legal system.

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No international agreements have had a more far-reaching effect on the internal legal systems of State parties than the treaties establishing the European Union and their predecessors (the European Treaties). This is evident in the vast range of substantive areas which are regulated by the European Treaties and EU secondary legislation, which have left few areas of Irish law completely untouched. Just as importantly, it can be seen in the nature and characteristics of the law and the legal system established by those Treaties. Through the doctrines of direct effect and supremacy, in particular,[22] EU law takes effect in the legal systems of Member States with a force much more far-reaching than that enjoyed by other international obligations. While these special features justify its consideration separately from other sources of international law, European Union law is undoubtedly the most important source of international law, broadly understood, within the Irish legal system.

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[21] See e.g. Byrne and McCutcheon, *The Irish Legal System* (4th ed, Butterworths LexisNexis, 2003), at 8: "In international law terms the Irish legal system is dualist, that is to become part of national law an international measure must be specifically incorporated by a domestic instrument". See also *A.C.W. v. Ireland* [1994] 3 I.R. 232, at 243, where Keane J stated that "the Constitution, in other words, makes it clear that Ireland subscribes to the dualist theory of international law". See also *McL. v. D.* [2009] IESC 81, where Murray CJ stated that "the relationship between international treaties to which Ireland is a party and national law is imbued with the notion of dualism the effect of which finds expression in Article 29.6 of the Constitution".

[22] See e.g. Craig and de Búrca, *EU Law: Text, Cases and Materials* (4th ed, Oxford University Press, 2008), Chapters 8-10.

However, because of the specific characteristics of the European Treaties and the nature of the legal system they establish, European Union law is not merely international law. Its law forms an integral part of the Irish legal system, as in all Member States' legal systems. Moreover, the European Treaties themselves form an integral part of the constitutional law of Member States such as Ireland. These Treaties – as "the basic constitutional charter"[23] of the European Union or a "second but transcendent constitution"[24] for Member States – have considerably 'widened the scope' of Member States' constitutional law.[25] In the almost forty years since Ireland joined the EU, the Irish legal system has generally accepted the characteristics and claims of European Union law, including its supremacy, as set down in the Treaties and the jurisprudence of the European Court of Justice.[26]

However, aside from what might be called its 'internal law', the European Union, as it has engaged externally, has also accepted a substantial body of international obligations, its 'external law'. As a result of its important, and increasing, role in international relations, in areas in which Member States have, in whole or in part, pooled their sovereignty at EU level, the Union is now a significant actor in the international legal system in its own right. From the outset, the European Treaties vested in the European institutions considerable powers in specific areas of international relations, notably in the field of international trade, and, as the Union has evolved, these powers have considerably increased and intensified. Indeed, this increasing role in the field of international relations and, in particular, the formalisation of mechanisms for more general foreign policy coordination - in the case of the first major treaty amendment by the Single European Act - were at the heart of the dispute in *Crotty v. An Taoiseach*,[27] perhaps the most significant decision

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[23] Case 294/83 *Parti écologiste "Les Verts" v. European Parliament*,[1986] ECR 1339, at para. 23.
[24] Henchy, "The Irish Constitution and the EEC" (1977) 1 *DULJ* 20, at 23.
[25] For an important analysis of the general effect of European law on Irish constitutional law, see Temple-Lang, "The Widening Scope of Irish Constitutional Law" in Curtin and O'Keeffe eds, *Constitutional Adjudication in European Community and National Law. Essays for the Hon. Mr. Justice T. F. O'Higgins* (Butterworths, 1992), at 229.
[26] The well-known caveat to this general acceptance in the Irish legal system, an instance of a wider phenomenon in Member States' legal systems, is the dictum of Walsh J. in *SPUC v. Grogan* [1989] IR 753, at 768-9, in the context of the potential clash between the prohibition of abortion and the provisions of the European Treaties, that "in the last analysis" it would be for the Supreme Court to decide finally the interaction between Article 40.3.3 (prohibiting abortion) and the provisions of Article 29.4 from which those Treaties derive their validity within Irish law. In their discussion of this dictum, the editors of *Kelly* note, at paras. 5.3.95-96, that "there have been some hints that the national courts may be reluctant to yield total supremacy in the area of fundamental rights" but that Walsh J's remarks "must be regarded as isolated ones and entirely confined to an area of great sensitivity and it is unlikely that they would nowadays be followed": Hogan and Whyte, *J.M. Kelly: the Irish Constitution* (4th ed, LexisNexis Butterworths, 2004).
[27] *Crotty v. An Taoiseach* [1987] IR 732.

of the Irish courts in the field of international relations, in which the Supreme Court held that the State could not ratify Title III of the Single European Act, formalising European Political Cooperation, in the absence of a constitutional amendment.[28] Since then, through the substantial amendments made in the Maastricht, Amsterdam and Nice Treaties and, most recently, the Lisbon Treaty, (all of which have necessitated constitutional amendments in Ireland as a result of the *Crotty* decision), the role of the European Union in international affairs, a major theme in the recent long-running debate about the future of the EU, has been consolidated.[29]

The European Union, in its own right and alongside Member States, is party to a wide range of international agreements, which, by virtue of the European Treaties, are "binding upon the institutions of the Union and on its Member States".[30] The Court of Justice has consistently held that such agreements, upon entering into force, form an integral part of European Union law.[31] On this basis, employing the monist-dualist classification set out above, the approach of the European Union legal system to international law is often described as monist.[32] Thus, the starting point in European Union law contrasts starkly with the traditional position in Irish law where, as we have seen, pursuant to Article 29.6 of the 1937 Constitution, no international agreement shall be part of Irish law save as may be determined by the Oireachtas, in other words, unless it is given effect through legislation. However, as this study hopes to demonstrate, these labels do not reflect the complexity of the position.

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The thesis underlying this research is that these developments call for a re-evaluation of the traditional understanding of international law within the Irish legal system. In particular, these developments call into question the ill-fitting doctrines of monism and dualism in the analysis of the implementation of international law, at the very least within the European Union. Although these doctrines may be of some limited use, if understood as loose labels describing a general attitude to or orientation in the implementation of international law, they lack the necessary explanatory power to serve as general accounts of the relationship between international and internal law, particularly as international obligations are increasingly undertaken within the

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[28] See Chapter 2, Section II.E&F.
[29] See Chapter 2, Section II.F.
[30] Article 216(2) of the Treaty on the Functioning of the European Union (TFEU).
[31] This has been consistently reaffirmed since Case C-181/73 *Haegeman*, para.5.
[32] See e.g. Rosas, "The European Court of Justice and Public International Law", in Wouters, Nollkaemper and de Wet eds, *The Europeanisation of International Law: the Status of International Law in the EU and its Member States* (TMC Asser Press, 2008), at 75-76; Schutze, "On Middle Ground: The European Community and Public International Law", EUI Working Paper 2007/13.

context of the European Union. Moreover, they often deflect from the essence of the problem, as a matter of international and internal law.

As section III of this Chapter makes clear, the doctrines of monism and dualism have long been criticised and on many different grounds. In the first instance, the doctrines never accurately reflected the practice. Secondly, their deployment in the context of internal legal systems (all such systems strictly speaking adopting a 'dualist' approach to the validity of international norms) involved a significant relaxation of their underlying theories and terminologies. Thirdly, as a result of far-reaching developments both in international and internal legal systems, as well as the development of new forms of international organisation, such as the EU, if these doctrines ever accurately reflected the practice, they now do so less than ever. Many of their fundamental premises have been undermined. As the diversity and reach of international law has increased, implementation within internal legal systems raises complex practical problems of coordination and translation. Furthermore, as the constitutional landscapes of internal legal systems have evolved, the fundamental questions of principle to which the implementation of international law gives rise within these systems must be re-visited.

The EU has radically affected the relationship between international law and the law of Member States, such as Ireland. It is clear that, as a 'third dimension' to the traditional two-dimensional relationship, EU law, which is at once the most important source of international law for Member States *and* an integral part of their constitutional law and legal systems, presents a fundamental challenge to the traditional conceptions of monism and dualism. The effects of EU law, insofar as they relate to the Union's internal law and policies, have already been the subject of detailed academic scrutiny.[33] Of primary interest in this study is the 'external law' of the European Union i.e. the international obligations by which it, and consequently its Member States, are bound. In the formation of international law, the real locus of decision-making is often now Brussels, not Dublin. In the implementation of international law, too, the primary decision-makers are now frequently the European Union institutions, not organs of the Irish government although the two are inter-linked in some respects. In the formulation of foreign policy, the European Union is no longer merely a component part but a central plank. However, the nature of the EU, and the division of powers between EU and Member States, is such that it is generally not a simple question of transfer of powers but a far more nuanced and

[33] For a review of the Irish literature, see infra Section II.B.

multifaceted complex of relations, roles and responsibilities. As a matter of law, however, the privileged position of the European Union in the legal systems of its Member States is such that its influence on these issues cannot be underestimated.

Thus, it is argued that it is no longer possible to consider the implementation of international law within the Irish legal system without having regard to the significant and strengthening European Union dimension to this process. The purpose of this study is to examine and assess critically the effect of this changing framework on implementation of international law in the Irish legal system and, in so doing, explore the more general problem of implementation of international law within internal legal systems. To date, as the following section shows, this issue has received little scholarly attention, particularly in the case of the Irish legal system.

After sketching the foundations of the study in the remaining sections of this introduction, Chapter 2 offers a general outline of the changing legal framework of Ireland's international relations in the context of its membership of the European Union. In Chapters 3 to 6, the core of the thesis, a detailed examination is conducted, by reference to the major sources of international law, of the effect of this changing legal framework on the implementation of international law within the Irish legal system today. Before doing this, the following section of this chapter will address a number of preliminary issues in relation to the scope, structure and context of this research and it will then analyse the general problem at the core of the thesis, that is, the implementation of international law within internal legal systems within, first, the theoretical framework and, secondly, its international law framework.

II. PRELIMINARY ISSUES

As this thesis raises issues of international law, European Union law and Irish law, and examines the implementation of international law generally, it is necessary to define its scope in more detail before considering its substance, which is the purpose of this section. First, a number of key terms used in the thesis are defined. Secondly, the literature in the wider field is briefly analysed in order to give focus to the core issues relevant to the thesis. Thirdly, in view of the cross-cutting nature of the subject-matter, the methodology adopted is set out. Fourthly, the chosen structure is presented. While the scope of the thesis is broad, many of the individual issues in

relation to the European Union, and some of the issues relating to Irish legal system, have already been considered in some depth and thus do not need to be dealt with in detail in this study. Drawing upon such sources, it is possible to focus on those areas which have been neglected to date, many of which lie on the interstices of well-trodden fields, and which together form the thrust of the thesis.

A. Definitions

First, for the purpose of this study, the Irish legal system is that governing the State as established under the Constitution of the Irish Free State, 1922, and now the 1937 Constitution.[34] For the purposes of clarity, "the Irish legal system" in this sense does not encompass the legal system of Northern Ireland, which remains part of the United Kingdom of Great Britain and Northern Ireland and which, while sharing many common traits, remains a separate and distinct legal system.

Secondly, international law, or public international law, has already been defined as "the body of rules whch are legally binding on states in their intercourse with each other".[35] As Jennings and Watts elaborate:

> These rules are primarily those which govern the relations of state, but states are not the only subjects of international law. International organisations and, to some extent, also individuals may be subjects of rights conferred and duties imposed by international law.[36]

As the thesis will explore, although the international legal system remains in the first instance a system of sovereign States, increasingly, international organisations – including those at a regional level, foremost among them being the European Union – now play an extremely important role within that system. Public international law is distinct from private international law or conflict of laws which, while increasingly becoming governed by instruments of public international law, is essentially a matter of national law.[37]

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[34] As Article 4 of the 1937 Constitution states, "the name of the State is Eire, or, in the English language, Ireland". Although section 2 of the Republic of Ireland Act, 1948 declares that "the description of the State shall be the Republic of Ireland", the use of that description in place of the official name of the State has been criticised. See *Ellis v. O'Dea (No. 1)* [1989] IR 530, [1990] ILRM 87 (per Walsh J, criticizing the practice of the courts in the United Kingdom referring to the State as the Republic of Ireland in extradition warrants), discussed in Kelly (4th ed, at 3.2.03). See also *Kutchera v. Buckingham International Holdings* [1988] IR 61, [1988] ILRM 50.

[35] Jennings and Watts, note 2, 4.

[36] *Ibid.*

[37] Jennings and Watts, note 2, at 7: "Although the rules of private international law are part of the internal law of the State concerned, they may also have the character of public international law where they are embodied in treaties". In this context, some confusion has arisen in the Irish legal system as a

Thirdly, in the course of this research, the term 'European Union' (EU), unless otherwise specified, is understood to refer to both the current European Union as well as its historical predecessors, in particular the European Economic Community and the European Communities.[38] As a result of the numerous revisions of the Treaties, reference to the European Union and its Treaties, as they have evolved, poses considerable terminological difficulty. To accommodate this, while specific references will retain the historically and legally accurate terminology, general references to the entity and to its law will, for the purposes of simplicity and clarity, be to the European Union and to European Union (EU) law.[39] The 'European courts' refers to the Court of Justice and the General Court (formerly the Court of First Instance).

Fourthly, the term 'implementation' is used compendiously to describe the process of giving effect to international law within internal legal systems. Many of the other terms in common usage in this context – in particular, incorporation, transformation, and adoption – carry a significant amount of doctrinal and jurisprudential baggage.[40] Accordingly, the more neutral term of implementation, while imperfect,[41] is preferred in this study. Although other neutral terms such as 'internalisation' or 'reception' are helpful, they arguably lack the breadth of, and the emphasis on process inherent in, the term 'implementation'.

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result of a dictum of Keane J.(as he then was) in *A.C.W. v. Ireland* [1994] 3 IR 232, where the learned judge commented that Article 29.3, which refers to Ireland's acceptance of the "generally recognised principles of international law", "would seem, at a first reading, to be confined in its operation to principles of public international law": [1994] 3 IR 232, at 242. This dictum provoked further discussion within the deliberations of the Constitution Review Group which queried whether "Article 29.3 covers private international law as well as public international law": Report of the Constitution Review Group (Stationary Office, 1996), at 108. Indeed, its sole recommendation in respect of Article 29.3 was that section 3 should be amended to refer to public international law alone, which Symmons aptly describes as "a seemingly unnecessary change": Symmons, "The Incorporation of Customary International Law into Irish Law" in Biehler, *International Law in Practice: An Irish Perspective* (Thomson Round Hall, 2005), at 117. The phrase "generally recognised principles of international law" – *a fortiori* when it is read in the context of the State's "relations with other States" – refers only to public international law; private international law is a matter of domestic law (and something of a misnomer to this extent), although, where it is sought to regulate matters of private international law by treaty, it may then take on the form and character of public international law.

[38] In accordance with Article 1 of Title I of the Treaty on European Union (as amended by the Lisbon Treaty), "the Union shall replace and succeed the European Community". Refer to the relevant provisions of the EU treaties. As a matter of Irish law, this change is recognised in the European Union (Treaty of Lisbon) Act, 2009.

[39] The broader term 'European law' is sometimes used to refer not alone to the law of the European Union but also the law deriving from instruments of other European regional organisations such as the Council of Europe, in particular the European Convention on Human Rights.

[40] See e.g. Seidl-Hohenveldern, "Transformation or Adoption of International Law into Municipal Law" (1963) 12 *ICLQ* 88.

[41] Implementation may be regarded as presupposing an element of active 'internalization' (what might be called incorporation or transformation according to one's taste) which may appear unsuitable in respect of, for example, general international law. However, it has the benefit of emphasizing the processual nature of internalization.

Finally, notwithstanding certain nuances, the terms - internal, national, domestic and, decreasingly, municipal law - are all commonly used to describe the relationship of international law and national legal systems. Because this thesis examines the effects of international law both within the Irish and EU legal systems (and is thus concerned not exclusively with 'domestic' or 'national' legal systems), the term 'internal' is preferable when describing the relationship in the context of these legal orders. However, although the term 'internal' is used where appropriate, because of the common usage of other terms and the high degree of interchangeability, it is not proposed to adopt an unduly strict approach to the terminology in this respect.

B. Literature Review

In this section, it is proposed to set out briefly and by way of broad outline the existing literature relevant to the research question, so as to place the study, and its proposed contribution, in context. The relevant literature will be considered in more depth at the appropriate junctures in the course of the substantive study. Although the literature on the relationship between national law and international law generally, and within the context of national implementation specifically, is vast,[42] the issues at the heart of this study have, with some notable exceptions, been neglected, particularly in Irish legal scholarship.

The study of international law in Ireland has been limited to date. Although the subject is increasingly studied within Irish universities, the implications of international law for the State and its legal system have received scant consideration. The sole text treating of international law from "an Irish perspective"[43] is directed at the field of international law generally from an Irish viewpoint rather than an examination of its implementation within the Irish legal system. Insofar as this thesis is concerned, of chief relevance in that volume is the contribution by Symmons on the incorporation of customary international law within the Irish legal system.[44] Indeed, the work of Symmons is the notable exception to the otherwise sparse field of scholarship in this area. Since the 1970s, he has contributed a number of significant articles on this topic, both in respect of the effect of treaties[45] and custom[46]

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[42] For a sample of this literature, see the references in Section III of this Chapter.
[43] Biehler, note 38. Another recent development has been the publication of the *Irish Yearbook of International Law* (Hart Publishing).
[44] Biehler, note 38, Chapter 5.
[45] Symmons, "International Treaty Obligations and the Irish Constitution: The McGimpsey Case" (1992) 41 *ICLQ* 311.

within the Irish legal system as well as on specific issues of importance within the field.[47] While a number of other scholars have also dealt with discrete issues,[48] the only other significant consideration of the place of international law within the Irish legal system is to be found in the general texts on Irish constitutional law.[49]

Although the general field of international law as it relates to Ireland has been largely unexplored, there is a considerable body of scholarship in certain specialised areas of international law. This is the case in relation to international human rights law,[50] and in particular the regional system established under the European Convention on Human Rights.[51] In a number of other areas of international law or Irish law with a strong international dimension – such as the law of the sea and related areas,[52] refugee and immigration,[53] extradition,[54] and Northern Ireland[55] –

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[46] Symmons, "The Law Enforcement Commission Report and Article 29 of the Irish Constitution" (1973) 8 *Ir Jur (n.s.)* 33; Symmons, "The Criminal Law (Jurisdiction) Act 1976 and International Law" (1978) 13 *Ir Jur (n.s.)* 36; Symmons, "Ireland - Irlande" in Eisemann ed, *L'intégration du droit international et communautaire dans l'ordre juridique national* (Kluwer, 1996); Symmons, "The Incorporation of Customary International Law into Irish Law" (1996) 31 *Ir Jur* 165; Symmons, "The Relationship of International Law and Domestic Law in South Africa and Ireland: A Comparative Analysis" in Binchy and Sarkin eds, *Human Rights, the Citizen and the State: South African and Irish Approaches* (Round Hall, 2001).

[47] In addition to numerous articles on the law of the sea, see Symmons, *Ireland and the Law of the Sea* (2nd ed, Round Hall Sweet & Maxwell, 2000).

[48] In relation to international agreements generally, Lysaght, "The Status of International Agreements in Irish Domestic Law" (1993) 11 *ILT (ns)* 11. On specific cases dealing with custom, see Heffernan, "International Law – State Immunity" (1992) 14 *DULJ* 160, Gaffney, "The Status of International Customary Law in Irish Domestic Law: A Review of the Toledo Case" (1996) 14 *ILT (ns)* 192, Anderson, "*Par in Parem Non Habet Imperium* – the Problem of Foreign Sovereign Immunity: An Irish Perspective" (1997) 15 *ILT (ns)* 200. More recently, see de Londras, "Dualism, Domestic Courts, and the Rule of International Law" UCD Working Papers in Law, Criminology & Socio-Legal Studies 05/2009.

[49] See Casey, *Constitutional Law in Ireland* (3rd ed, Round Hall Sweet & Maxwell, 2000), Ch. 8, Hogan and Whyte, note 26, Chapter 5.3. See also Forde, Constitutional Law (2nd ed, FirstLaw, 2004), Ch.2 and Doyle, *Constitutional Law: Text, Cases and Materials* (Clarus Press, 2008), Ch.12.

[50] See e.g. Heffernan and O'Flaherty eds, *International covenant on civil and political rights: international human rights law in Ireland* (Brehon, 1995); Kilkelly, "In the best interests of the child? : an evaluation of Ireland's performance before the UN Committee on the Rights of the Child" (1998) 19 *ILT (ns)* 293; Byrne, "Changing modalities: implementing human rights obligations in Ireland after the Good Friday Agreement" (2001) 70 *Nordic JIL* 1; Egan, "The European Convention on Human Rights Act 2003: a Missed Opportunity for Domestic Human Rights Litigation" (2003) 25 *DULJ* 230; Egan and Murray, "A Charter of Rights for the Island of Ireland: an Unknown Quantity in the Good Friday/Belfast Agreement" (2007) 56 *ICLQ* 797.

[51] As well as extensive journal contributions, see especially Heffernan ed, *Human Rights: A European Perspective* (Round Hall/ICEL, 1994), Kilkelly ed, *ECHR and Irish Law* (2nd ed, Jordan, 2009) and de Londras and Kelly, *The European Convention on Human Rights Act: Operation, Impact and Analysis* (Thomson Round Hall, 2010). See also e.g. Doolan, *Lawless v. Ireland (1957-1961): The First Case before the European Court on Human Rights: An International Miscarriage of Justice?* (Ashgate, 2001).

[52] Symmons, note 47, and Symmons ed, *Annotated Irish Maritime Law Statutes 2000-2005* (Thomson Round Hall, 2006), as well as many articles in Irish and international journals. See also Long, *Marine Resources Law* (Thomson Round Hall, 2009).

[53] See e.g. Fraser, *Sanctuary in Ireland: perspectives on asylum law and policy* (IPA, 2003); Cubie and Ryan, *Immigration, refugee and citizenship law in Ireland* (Thomson Round Hall, 2004).

[54] Forde, *Extradition Law* (2nd ed, Thomson Round Hall, 2005). See also Connelly, "Non-Extradition for Political Offences: A Matter of Legal Obligation or Simply a Policy Choice?" (1982) *Ir Jur* 59.

there have also been important contributions. Some prominent international issues have received attention in the political science literature.[56]

However, there has been no comprehensive study of the implementation of international law within the Irish legal system.[57] While the character and obligations arising under particular international agreements undoubtedly justify their examination from a specialist perspective, there is nonetheless a need for an analysis of the general framework in which all international obligations, including those of a specialised character, fall to be implemented. This thesis proposes to contribute to the filling of this significant gap in the literature.

The nature, scope and volume of scholarship in European Union law has rendered it a distinct field of inquiry from international law. Insofar as the perspective of the Irish legal system is concerned, in addition to countless journal contributions (recently, in the Irish Journal of European Law but, for a long time, in journals such as the International and Comparative Law Quarterly, the Common Market Law Review, the European Law Review, the European Law Journal among others), a number of full-length treatments of this field, or sub-fields thereof, have been produced as well as a large volume of edited volumes.[58]

Scholarship in the field of the law of EU external or international relations has recently burgeoned.[59] However, while some degree of analysis of the complex

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[55] Morgan, *The Belfast Agreement: A Practical Legal Analysis* (2000). For a recent analysis of some of these issues, see Humphries, *Countdown to Unity?: Debating Irish Reunification* (Irish Academic Press, 2008).

[56] This is the case in relation to neutrality. See e.g. Keatinge, *A singular stance: Irish neutrality in the 1980s* (IPA, 1984); McSweeney ed, *Ireland and the threat of nuclear war: the question of Irish neutrality* (Dominican Publications, 1985); Doherty, *Ireland, neutrality and European security integration* (Ashgate, 2002).

[57] The exception might be the short but reasonably comprehensive survey of Symmons in Eisemann, note 46, but this does not cover the 'external' European Union dimension in any detail.

[58] McMahon & Murphy, *European Community Law in Ireland* (Butterworths, 1989); Kennedy et al eds, European law (Law Society of Ireland Manual, 3rd ed, Oxford University Press, 2006); Carolan, EU Law for Irish Students (Gill and MacMillan, 2004). See also Reid, *The Impact of Community Law on the Irish Constitution* (ICEL, 1990); Phelan, *Revolt or Revolution? The Constitutional Boundaries of the European Union* (Round Hall, 1997); Fahey, *Practice and procedure in preliminary references to Europe : 30 years of Article 234 EC case law from the Irish Courts* (First Law, 2007); Lucey and Keville, *Irish Perspectives on EC Law* (Round Hall, 2003). See generally the papers of the Irish Centre of European Law. For an early treatment preceding Irish accession, see Temple-Lang, *The Common Market and common law: legal aspects of foreign investment and economic integration in the European Community, with Ireland as a prototype* (Chicago University Press, 1966).

[59] Recent full-length treatments of this sub-field include Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford University Press, 2004); Koutrakos, *EU International Relations Law* (Hart Publishing, 2006); de Baere, *Constitutional Principles of EU External Relations* (Oxford University Press, 2008). Of older volumes, MacLeod, Hendry and Hyett, *The External Relations of the European Communities* (Oxford University Press, 1996) is particularly valuable. See also McGoldrick, *International Relations Law of the European Union* (Longman, 1997). Many important edited volumes have also appeared recently including: Cremona and de Witte eds, *EU Foreign Relations Law: Constitutional Fundamentals* (Hart Publishing, 2008); Cremona, ed,

interaction between international, EU and Member States' legal systems is present in such studies, the focus has clearly been on the perspective of the EU legal system specifically. Only rarely and quite recently have scholars directed attention to the complex tripartite dimension which characterises this field.[60]

While Irish scholars have occasionally considered elements of this field,[61] there has been minimal consideration from the perspective of the Irish legal system as opposed to the European Union legal system, let alone consideration of the tripartite dimension, i.e. Irish, international and European Union law, of that problem. The only existing analysis is either very brief, as in the case of Irish national report for the 2006 FIDE Conference,[62] or dated, as in the case with respect to the commentary by Hogan and Whelan on mixed agreements.[63] Again, this study seeks to contribute to filling this significant gap in the literature. Thus, the area under review in this study lies at the interstices of a number of distinct fields of inquiry, something which has undoubtedly contributed to its neglect to date.

C. Methodology

Developments in EU External Relations Law (Oxford University Press, 2008); Dashwood and Maresceau eds, *Law and Practice of EU External Relations* (Cambridge University Press, 2008); Wouters, Nollkaemper and de Wet eds, note 32. Earlier volumes of importance include Dashwood and Hillion eds, *The General Law of E.C. External Relations* (Sweet & Maxwell, 2000) and Koskennemi ed, *International Law Aspects of the European Union* (Kluwer, 1998).

[60] Wouters, Nollkaemper and de Wet eds, note 32. See also Schutze, note 32. For a theoretical consideration of the issues, see the valuable analysis in Bethlehem, "International law, European Community law, National Law: Three Systems in Search of a Framework", in Koskenniemi ed, note 59. See also Hartley, "National Law, International Law and EU Law: how do they relate?" in Capps, Evans and Konstadinidis, *Asserting Jurisdiction: International and European Legal Perspectives* (Hart, 2003) and Hartley, "International Law and the Law of the European Union—A Reassessment" (2001) 72 *British Year Book of International Law* 1. In specialised sub-fields, such as trade, the literature is vast. See also Lavranos, *Legal Interaction between Decisions of International Organizations and European Law* (Europa, 2004) and Besson, "European Legal Pluralism after *Kadi*" (2009) 5 *EuConst* 237.

[61] Notable contributions have been made by Temple-Lang (e.g. Temple Lang, "The Ozone Layer Convention: A New Solution to the Question of Community Participation in "Mixed" International Agreements" (1986) 23 *CMLR* 157), O'Keeffe (e.g. Emiliou and O'Keeffe eds, *The European Union and world trade law: after the GATT Uruguay Round* (John Wiley & Sons, 1996); O'Keeffe and Schermers, *Mixed Agreements* (Kluwer Law and Taxation, 1983)) and de Búrca (e.g. de Búrca and Scott eds, *The EU and the WTO: legal and constitutional issues* (Hart, 2001); de Búrca, "The EU, the European Court of Justice and the International Legal Order after *Kadi*" (2009) *Jean Monnet Program Working Paper* No. 01/09).

[62] Cahill, "External Relations and the Member States: Competence, Mixed Agreements, International Responsibility, and the Effects of International Law: Ireland National Report" (2006) 13 *Irish Journal of European Law* 143. See also Kingston, "The International Community, the European Union and its Member States" in Obradovic and Lavranos eds, *Interface between EU law and national law: proceedings of the annual Colloquium of the G.K. van Hogendorp Centre for European Constitutional Studies* (Europa Law Publishing, 2007).

[63] Hogan and Whelan, *Ireland and the European Union: constitutional and statutory texts and commentary* (Sweet & Maxwell, 1995), Ch. 5.

This is a legal study and the methodology adopted reflects this. The basic methodology may be described as doctrinal legal analysis. However, on account of its subject-matter and scope – first, in going beyond the study of a particular legal system and exploring the interaction between international law, European Union law and Irish law and, secondly, in studying areas of law which are particularly exposed to politics – the study raises a number of methodological issues, on which it may be useful to make a number of observations at this stage.

Doctrinal legal analysis, according to McCrudden, is concerned with "the understanding and internal coherence of legal concepts and legal reasoning: how legal concepts fit together, the consistency of the use of concepts in different areas of law, the extent to which general principles can be extracted from legal reasoning that can be used to predict or guide future legal decision-making".[64] This methodology is "one that concentrates on the primacy of critical reasoning based around authoritative texts"[65]; however, "this is not simply textual analysis, at least in common law systems, for the idea of law as a practice is deeply embedded".[66] Finally, McCrudden notes that "traditional legal analysis adopts an internal approach ... the analysis of legal rules and principles taking the perspective of an insider in the system... " whereas "an external approach in contrast is the study "of the law in practice, of legal institutions at work in society rather than legal rules existing in a social, economic and political vacuum"", with much recent scholarship adopting both approaches.[67]

Doctrinal legal analysis, traditionally and typically to this day, has as its focus the workings of a national legal system or specific elements thereof. Because this study is more widely focused, it may be said to adopt an external approach to its analysis in two important respects.

First, as a result of the growing importance of international law generally, and European Union law specifically, it is no longer possible to understand national law, such as Irish law or other Member States, within a purely national context. Consequently, legal methodology must be understood in a broader sense. International law and EU law undoubtedly possess distinct characteristics which

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[64] McCrudden, "Legal Research and the Social Sciences" (2006) 122 *LQR* 632, at 634.
[65] *Ibid*, at 633.
[66] *Ibid*. As he also observes, such analysis "frequently proceeds from a view of the legal system as either completely autonomous or, more usually, relatively autonomous...".
[67] Ibid, at 634, citing Ibbetson, "Historical Research in Law" in Cane and Tushnet eds, *Oxford Handbook of Legal Studies* (Oxford University Press, 2003) 863, at 864.

render their analysis different from that of, say, Irish law.[68] However, for the purposes of this study, while acknowledging the many distinctions which undoubtedly exist and the problems of translation which ensue (which forms indeed a theme of the research), a common field of law is assumed. The boundaries between national and international law have blurred and broken down to a great extent, nowhere more so than in the Member States of the EU. Just as the societies which they regulate interact, these legal systems – Irish, European, and international – are inter-linked at a number of levels and with increasing intensity. The study seeks first to explain and evaluate each of these systems in their own terms, thereby better understanding their interaction and answering important parts of the broader question which is at the heart of this research. Proper analysis of the individual pieces is essential in order to solve this bigger puzzle. Such difficulties should not prevent communication, dialogue and interaction concerning these fields of inquiry on the scholarly plane no more than they do on the practical and political planes. The issues themselves and the practice traverse these different spheres and, accordingly, so too must the research. Thus, while caution is required, these different systems, and the areas between them, demand exploration.

Secondly, while the study's focus is on the law and on legal analysis, it is essential to recognise that the interactions it examines are not always capable of explanation in or reduction to purely legal terms. While this may be said of most, if not all, areas of law – in that the boundary between law and politics is, in more or less obvious ways, malleable or porous – this is particularly so of the present study, located as it is on the faultlines between constitutional and international law, both of which are very politically exposed and sensitive fields of law.[69] The significant political dynamic at play in those interactions cannot be ignored. Thus, while the study, as is typical in legal analyses, examines the practice of courts in detail, it also

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[68] While this critique is less frequent in the case of European law, because of its special characteristics and its acceptance within national legal system, it continues to be common in the sphere of international law where its legal force sometimes continues to be questioned, even if, as Jennings and Watts comment, "in practice international law is constantly recognised as law by the governments of states who regard their freedom of action as legally constrained by international law": Jennings and Watts, note 2, at 13. See also the famous comment of Henkin, *How Nations Behave: Law and Foreign Policy* (Columbia University Press, 1979), at 47: "Almost all nations observe almost all principles of international law and almost all their obligations almost all of the time". Franck has described international law as having moved into a "post-ontological era" where, instead of asking if international law is law, the questions are whether international law is effective, enforceable, understood and, most importantly, fair: Franck, *Fairness in International Law and Institutions* (Oxford University Press, 1998), at 6.

[69] For an interesting recent analysis of the similarities in character of constitutional and international law in this respect, see Levinson and Goldsmith, "Law for States: International Law, Constitutional Law, Public Law" (2009) 122 *Harvard Law Review* 1791.

places some emphasis on the practice of other constitutional, 'political' organs (i.e. it may be said not to be exclusively court-o-centric).

In these senses, therefore, the study may be understood as adopting an external approach to its doctrinal legal analysis and may be considered, to the extent just outlined, a study of law in context.[70]

The specific doctrinal context within which this study is situated is, as already mentioned, that of monism and dualism, which have dominated the theoretical debate on the relationship between international law and national law. These doctrines themselves find their bases within broader discussions as to the basis of all law.[71] As the following section of this chapter will demonstrate, this study challenges the utility of these doctrines in explaining the effect of international law within the Irish and European Union legal systems. However, the thrust of the thesis is not advocacy for another fully-fledged doctrine to take their place but rather that the basic question of the relationship between international law and national law (within the context of the EU) must be re-focused as must the framework within which it is examined.

D. Structure

Although this research gives rise to many complex issues, it is proposed to adopt a relatively simple structure. After briefly setting out the broad context of the study in this chapter, it is proposed to examine the changing legal framework of Ireland's international relations, in particular the shifting allocation of power between Ireland and the European Union, in Chapter 2. This is necessary in order to identify the legal framework within which international obligations become binding on the State, both independently and as a Member State of the EU.

After setting out this framework, it is proposed to examine the implementation of international law within the Irish and European Union legal systems in detail. This examination is structured by reference to the principal sources

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[70] See Twining, "Reflections on 'Law in Context'" in Twining, *Law in Context: Enlarging a Discipline* (Oxford University Press, 1997), at 36.

[71] Waldock, in his general course at the Academy, incisively observed that differences between these theorists of monism and dualism revealed a "difference in their respective views concerning the very basis of law itself": Waldock, "General course on public international law" (1962-II) 106 *Recueil des cours* 1. See also Greig, *International Law* (Butterworths, London, 1976), at 52, who notes that "much of the difficulty of the theoretical approach arises from the fact that monism and dualism are not so much theories of the relationship of international law and municipal law as explanations of the underlying basis of legal obligation".

of international law. This research focuses on the implications of EU membership on the implementation of international law within the specific case of the Irish legal system. It does not analyse in detail the implementation of the secondary internal law of the European Union in the Irish legal system which has already been extensively examined in the literature.[72]

The classic statement of the sources of international law is Article 38(1) of the Statute of the International Court of Justice.[73] This identifies three sources of international law – which are treaties,[74] custom,[75] and general principles[76] – as well as two "subsidiary means of determination" of the law, judicial decisions and scholarly writings.[77] Originally drafted in 1920, this statement has, as international law has rapidly expanded, been criticised for being incomplete. In particular, since the early 20th century, international law has witnessed the rising importance of international organisations and the law created within these organisations, which law is only indirectly covered by Article 38(1) in the sense that it ultimately derives its validity from the constituent charters of the international organisations which are treaties within the meaning of Article 38(1)(a). Moreover, the form and character of international legal instruments has increasingly diversified and many elements, which do not fit within this formal categorisation of sources, such as international standards and soft law, are also of practical and political importance both within the international legal system and internal legal systems.

Although they have given rise to much controversy,[78] the sources of international law nonetheless form a basic definitional and organisational element within the international legal system, as indeed in most legal systems. Whatever its

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[72] See e.g. Collins and O'Reilly, "The application of community law in Ireland 1973-1989" (1990) 27(2) *Common Market Law Review* 315; Hogan, "The implementation of European Union law in Ireland : the Meagher case and the democratic deficit" (1994) 3(2) *Irish Journal of European Law* 190; Travers, "Community Directives: Effects, Efficiency, Justiciability" (1998) *Irish Journal of European Law* 165; Doherty, "Land, Milk and Freedom - Implementing Community Law in Ireland" (2004) 11(1) *Irish Journal of European Law* 141.

[73] See generally the valuable analysis of Pellet, "Article 38" in Zimmermann ed, *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, 2005), 655.

[74] Article 38(1): "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states".

[75] Article 38(1)(b): "international custom, as evidence of a general practice accepted as law".

[76] Article 38(1)(c): "the general principles of law recognized by civilized nations".

[77] Article 38(1)(d): "subject to the provisions of Article 59 ["the decision of the Court has no binding force except between the parties and in respect of that particular case."], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".

[78] See e.g. Fitzmaurice, "Some Problems regarding the Formal Sources of International Law" in F. M. van Asbeck et al eds, *Symbolae Verzijl* (The Hague, 1958). See generally Pellet, note 73.

subject-matter, whatever its scope, it is through these sources that international law is formed and given effect. As Hall has noted,

> ...the most effective research in international law is that which pays faithful attention to its rather peculiar system of sources. A mastery of these sources, and an appreciation of the demands which they place upon the researcher, are essential ingredients for the pursuit of an effective and fruitful research programme in international law.[79]

Moreover, in the context of implementation within other legal systems, the sources offer a bridge between international law and internal law, in the sense that they are points of recognition between the systems. The source of a particular international obligation may have a significant influence on the manner in which it is given effect within national legal systems. In this regard, a certain degree of conflation of the sources of international law and their internal effects in the Irish jurisprudence highlights the importance of distinguishing between the different sources of international law and their potentially different normative effects.[80]

Although the source-based structure adopted for the core of the thesis may present some disadvantages,[81] it is suggested that these are outweighed by its benefits in providing a practical and understandable approach to the issues at the heart of the thesis. For the purposes of this study, a broad notion of the concept of sources of international law is adopted. Thus, while the focus of the thesis will be on the two principal sources of international law – treaties and customary international law – which are of the most practical and theoretical importance, the thesis will also consider acts of international organisations, with a focus on the resolutions of the United Nations Security Council, (which sheds important light on the role of the EU as a conduit for international norms into the Irish legal system) and international judicial decisions as a "subsidiary means of determination" identified in Article 38(1)(d). The substantive core of the thesis is therefore divided into four sections: International Agreements (Chapter 3); Customary International Law (Chapter 4);

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[79] Hall, "Researching International Law" in McConville and Chui eds, *Research Methods in Law* (Edinburgh University Press, 2007), at 181-206.

[80] For example, in *Horgan v. Ireland* [2003] 2 IR 468, at 505, the Court, discussing *Re Ó Láighléis* [1960] IR 93, stated: "This case is of particular importance having regard to the clarity of the obligations contained in the Convention, in contrast to the often somewhat "woolly" principles of customary international law. The principle however is the same when it comes to considering the role of international law in Irish domestic law".

[81] While the analysis of the sources individually poses a difficulty in terms of their dealing with the interactions, particularly because of the lack of clear hierarchy among sources and the growing concerns of fragmentation in international law, this study seeks to deal with those interactions at the appropriate junctures in considering the individual sources and by cross-referencing.

Acts of International Organisations (Chapter 5, taking UN Security Council resolutions as an example); International Judicial Decisions (Chapter 6).

III. THE THEORETICAL FRAMEWORK

The theoretical framework governing the relationship between international law and internal law has been dominated by the doctrines of monism and dualism which emerged, with the development of modern international law, in the late 19th and early 20th century.[82]

According to the doctrine of monism, international law and national law form part of a single legal order, the validity of which derives from a common source. Although some early expositions of monism were based on the superiority of national law to international law,[83] the dominant expressions of the doctrine posit the primacy of international law.[84] From this perspective, in respect of national implementation, international law is considered automatically part of the law applied within national legal systems and prevails over any contrary rules of national law. The doctrine has many prominent exponents, who have departed from different theoretical bases and adopted distinctive approaches to this basic position. For Kelsen, for instance, the unified system of norms based on a common *Grundnorm* flowed from the cognitive unity of all law, with national legal orders being derived

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[82] Many of the statements of these doctrines are complex and intricate. In this section, it is proposed only to set out their basic principles. The broader literature on the relationship between national law and international law is vast. The leading general texts on international law provide useful references to this literature: see Jennings and Watts eds, note 2, at 52-86; Daillier and Pellet eds, , *Droit international public (Nguyen Quoc Dinh)* (7th ed, LGDJ, 2002), at 92-97; Brownlie, *Principles of Public International Law* (7th ed, Oxford University Press, 2008), Chapter 2; Shaw, *International Law* (5th ed, Cambridge University Press, 2003), Chapter 4; Cassese, International Law (2nd ed, Oxford University Press, 2005), Chapter 12; Combacau and Sur, *Droit international public* (5th ed, Montchrestien, 2001), at 177-199; Akehurst, *A Modern Introduction to International Law* (6th ed, Routledge, 1987), chapter 4; Grieg, *International Law* (Butterworths, 1976), Chapter 2; Denza, "The Relationship between International and National Law", in Evans ed, *International Law* (2nd ed, Oxford University Press, 2006), at 423-448. See Partsch, "International Law and Municipal Law" in Bernhardt ed, *Encyclopedia of Public International Law* (North-Holland, 1992), at 1183-1202; Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1995), Ch. 12; Higgins, "Dualism in the Face of a Changing Legal Culture" in Andenas and Fairgrieve eds, *Judicial Review in International Perspective, Liber Amicorum in Honour of Lord Slynn of Hadley, Vol. II* (Kluwer, 2000), at 9; Waldock, note 71, 75; Ferrari-Bravo, "International and Municipal Law: The Complementarity of Legal Systems" in McDonald and Johnston eds, *The Structure and Process of International Law*, at 715-744; Verzijl, *International Law in Historical Perspective* (Vol I, Sijthoff-Leyden, 1968), Chapter II.

[83] See Jennings and Watts, note 2, at 54ff, and Cassese, note 82, at 213.

[84] See Partsch, note 82, at 1185, noting that the theory of primacy of national law was "abandoned long ago": "At present, only those monistic theories which accept the pre-eminence of international law in one form or the other are of interest".

from international law by way of delegation.[85] Lauterpacht's approach, for its part, focused on the individual as the ultimate beneficiary of all law, national and international.[86] Notwithstanding much internal diversity in the elaboration of the theories, common to all these expositions of monism is the unity of both systems with the superiority of international law.

According to the doctrine of dualism (or pluralism, as some authors refer to it, to reflect the multiplicity of legal systems), by contrast, national law and international law are separate legal orders which are essentially different from each other and each of which is supreme in its own sphere. These differences take a number of forms: first, the national and international legal systems govern different subject-matter; secondly, they have different subjects in that international law's concern is exclusively with the relationship between States; thirdly, the legal systems had different sources of law.[87] Consequently, international law is not automatically incorporated into national law and its place therein depends on national law: it could "neither as a body nor in parts be *per se* a part of municipal law".[88] Like monism, dualism has many exponents and variants. While this paragraph draws on the clear statement of the doctrine by Oppenheim,[89] the classic expression is perhaps that of Triepel[90] and Italian scholars, from Anzilotti[91] to Arangio-Ruiz,[92] have also made a rich contribution to this doctrine.

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The doctrines of monism and dualism have been the subject of sustained critique. In his survey of the field in 1987, Partsch noted that "the discussion, which certain authors claim has obscured resolution of actual practical problems, has now lost much of its vigour given the emergence of a more realistic approach".[93] This is perhaps the central critique levelled at both doctrines: their failure to reflect the

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[85] Kelsen, "Les rapports de système entre le droit interne et le droit international public", (1926) *Recueil des cours* 227-331. See also Kelsen, *Principles of International Law* (Rinehart & Co, 1952 reprinted by Lawbook Exchange, 2004), Chapter V.
[86] See Brownlie, note 82, at 32.
[87] Oppenheim, *International Law* (Longman, 1905), Chapter IV.
[88] *Ibid.*, at 26.
[89] *Ibid.*, at 91-92.
[90] Triepel, "Les rapports entre le droit interne et le droit international" in (1923) 1-I *Recueil des cours* 77-121.
[91] Anzilotti, *Corso di diritto intemazionale* (Rome, 1912-1915).
[92] Arangio-Ruiz, "Dualism Revisited: International Law and Interindividual Law" (2003) *Rivista di diritto internazionale* 910-999. See also Arangio-Ruiz, "International Law and Interindividual Law" and Gaja, "Dualism – A Review" in Nijman and Nollkaemper eds, *New Perspectives on the Divide between National & International Law* (Oxford University Press, 2007), Chapters 1 and 2 respectively.
[93] Partsch, note 82, at 1184.

practical reality of the relationship between national and international law. Verzijl criticised the "aprioristic approaches [which] are equally arbitrary and [whose] visionary character tends to cloud or blur the actual legal occurences in this field...".[94] Indeed, many of the doctrines' strongest exponents recognised their limitations when confronted with the reality of practice. Lauterpacht, for example, perceived as a strong advocate of monism, acknowledged that the doctrinal controversy between monism and dualism was "to a large extent unreal" and "no practical consequences of importance follow from any of the solutions adopted".[95] Similarly, Kelsen was "well aware that in existing society a dualistic pattern is still retained".[96] So too, as Arangio-Ruiz has observed, notwithstanding their strong dualism, "[b]oth Triepel and Anzilotti envisaged intense interrelationship and even compenetration in a clearly factual sense".[97] The inadequacy of the doctrines to explain the reality of interaction between the international and national legal orders is thus well established.

This critique of the deficiency in the doctrines has been particularly strong in British scholarship in international law. In his general course at the Hague Academy, Fitzmaurice famously considered the entire monism-dualism controversy as "unreal, artificial and strictly beside the point" because it erroneously assumed a "common field of application" for national law and international law which presented the potential for systemic conflict.[98] According to Fitzmaurice, while there might be conflicts of obligation between these laws requiring reconciliation, there was no scope for systemic conflict and the real issue was the co-ordination of the systems rather than the sub-ordination of one system to the other. The consequence of a breakdown in this coordination was not the invalidity of, for example, a rule of national law which violated a rule of international law but the responsibility of the State for the breach of its international obligation in the international legal system. Waldock, in his general course at the Academy, incisively observed that differences between these theorists revealed a "difference in their respective views concerning the very basis of law itself" and was the "outcome of philosophical speculation rather than a close analysis of the legal principles actually regulating the relation between

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[94] Verzijl, note 82, at 91.
[95] Lauterpacht ed, *The General Works: Being The Collected Papers Of Hersch Lauterpacht* (Vol 1, Cambridge University Press, 1970), at 153.
[96] See Freeman, *Lloyd's Introduction to Jurisprudence* (7th ed, Sweet & Maxwell, 2001), at 270ff.
[97] Arangio-Ruiz, note 92, at 912.
[98] Fitzmaurice, "The General Principles of International Law Considered from the Standpoint of the Rule of Law" in *Recueil des cours* (1957-II), at 71.

international and national law today".[99] The dominant strand of contemporary British scholarship – as reflected in the work of Jennings and Watts,[100] Akehurst,[101] Brownlie,[102] and Shaw,[103] to take some of the most well-known general texts on international law – reflects this turn away from the doctrinal approach, focusing instead on the practical issues to which the relationship gives rise and on the varied approaches adopted in this regard in different jurisdictions.

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The influence of the doctrines of monism and dualism is nonetheless evident in the approach of national legal systems to international law. As noted by Waldock, "both theories have their importance, since they have influenced the development of legal doctrines in different countries; and international and national law as we see them today contain elements both of monism and dualism".[104] Indeed, the labels of monism and dualism are almost invariably applied in the analysis of national legal systems' approaches to the implementation of international law.

When used in this context, the terminology of 'monism' and 'dualism' is employed in a much looser way than within the strict expression of the doctrines themselves. Rather than defining the nature of the relationship generally, the appellations merely identify the general mode of implementation of international law: 'monist' referring to those systems which give international law some form of direct effect; 'dualist' being those systems which require an act of national law to give effect to international law.[105] In turn, the labels tend to be employed to describe varying levels of openness to international law and, in so doing, a system's basic attitude to international norms.

Ultimately, however, even in so-called 'monist' systems, strictly speaking a dualist approach is still taken to international law in that the validity of the rules providing, for example, for the automatic effect of treaties within the national legal order, is firmly based on a rule of national law. As Pellet has put it, a constitutional provision providing for the supremacy of international law, even over the

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[99] Waldock, note 82, at 83.
[100] Jennings and Watts, note 2.
[101] Akehurst, *A Modern Introduction to International Law* (6th ed, Routledge, 1987), Chapter 4.
[102] Brownlie, note 82, Chapter 2.
[103] Shaw, *International Law* (4th ed, Cambridge University Press, 2003), Chapter 4.
[104] Waldock, note 82, at 84. Brownlie has spoken of theoretical questions having "a certain, though not decisive, influence on writers dealing with substantive issues and also on courts": Brownlie, note 82, at 32.
[105] In the United Kingdom, and many other Commonwealth legal systems, this debate has largely been conducted under the labels of incorporation and transformation.

constitution itself, would continue to derive from dualism.[106] According to Pellet, "the 'triumph' of international law would still be contingent"[107] because, citing Combacau, it would result "from a decision freely taken by the State and freely revocable and not by virtue of an obligation extrinsic to the State's legal system".[108] In similar terms, Jacobs has emphasised that the "the effect of international law generally, and of treaties in particular, within the legal order of a State will always depend on a rule of domestic law".[109]

Even in so-called 'monist' systems, the effect of that approach is often frequently whittled down in practice. Higgins, having noted that it was a truism "to say that the monist-dualist dichotomy necessarily influences the way national courts treat issues of international law",[110] cautioned that this dichotomy was also an overstatement for two reasons:

> ... first, notwithstanding the potential of a monist State for easy receipt of international law into the domestic system, without further domestic enactment being necessary, there still remains the question of how familiar the judges are, even within that monist legal system, with the substance of international law. ...conversely, although dualism presents certain hurdles to the easy receipt of international law, a great deal can still be achieved if there is the institutional and moral desire to do so. And that is a matter of legal culture.[111]

Jacobs has described "the antithesis between "monist" and "dualist" approaches ....[as] an oversimplification which must be viewed with caution": "the reality is always more complex".[112]

Thus, while the Irish system is often labelled 'dualist', which is certainly accurate in the strict sense (as with all national legal systems), the approach it adopts to customary international law, under the looser labelling inspired by the doctrines, is

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[106] Pellet, "Vous avez dit "monisme"?: Quelques banalités de bon sens sur l'impossibilité du prétendu monisme constitutionnel à la française" in de Béchillon, Champeil-Desplats, Brunet, Millard eds, *L'architecture du droit: Mélanges en l'honneur du Professeur Michel Troper* (Economica, 2006), 827, at 855. See also Fitzmaurice, "The general principles of international law considered from the standpoint of the rule of law" (1957) 92 *Recueil des cours* 1.

[107] *Ibid.*

[108] Pellet, at 856. Combacau, "Le droit international: bric-à-brac ou système?" (1996) 31 *Archives de philosophie du droit (Le système juridique),* at 94.

[109] Jacobs, "Introduction", in Jacobs and Roberts eds, *The Effect of Treaties in Domestic Law* (BIICL, 1987), at xxiv.

[110] Higgins "Dualism in the Face of a Changing Legal Culture" in Andenas and Fairgrieve eds, *Judicial Review in International Perspective, Liber Amicorum in Honour of Lord Slynn of Hadley, Vol. II* (Kluwer, 2000), at 9.

[111] *Ibid.*

[112] Jacobs, see note 109.

arguably 'monist'.[113] Like many systems, the Irish system may be said to contain elements of both 'monism' and 'dualism', broadly conceived.[114] The same may be said of the European Union legal system.

In short, the manner in which the doctrinal labels are applied to internal legal systems is often far removed from the framework within which the doctrines were conceived from the perspective of international law. As a result, the doctrines have the potential to confuse, if not to mislead. As Brownlie has observed, "[on] the whole question of the relation between municipal and international law theoretical constructions have probably done much to obscure realities ...".[115] It is certainly the case that the doctrines of monism and dualism, as labels, have obscured as much as they may appear to have enlightened. This danger is particularly apparent in an extremely changed context of interaction between national law and international law from that in which the doctrines of monism and dualism were originally formulated.

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In addition to the looser way in which the doctrines have come to be understood in the context of national legal systems, profound changes in international law and national law have undermined some of the premises of the doctrines as originally formulated. In light of these changes, the shift from doctrinal to practical analysis of the legal problem has long signalled the need for a re-evaluation of the doctrines of monism and dualism, their premises, and indeed their utility, even in the looser sense just described. First, the entire international system has been transformed:

> When the theoretical discussion of the legal problem arose at the end of the 19th century, the international relations between a relatively small number of States were still somewhat archaic.[116]

This is stark contrast to the international legal system today. In addition to the huge increase in the number of States and other actors which participate in the international legal system, international law has, as set out in the introduction to this chapter, vastly expanded in its subject-matter and scope in the intervening period. International law applies in areas traditionally within the realm of national legal systems and is increasingly designed to take effect therein. This places the legal problem, to which monism and dualism were the doctrinal responses, in a very different context:

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[113] See Chapter 4, Section III.
[114] See generally Chapters 3-6.
[115] Brownlie, note 82, at 53.
[116] Partsch, note 82, at 1184.

> International developments, such as the increasing role of individuals as subjects of international law, the stipulation in treaties of uniform internal laws and the appearance of such legal orders as that of the European Communities, have tended to make the distinction between international law and national law less clear and more complex than was formerly supposed at a time when the field of application of international law could be regarded as solely the relations of states amongst themselves.[117]

Although the relationship between national and international law may continue to be properly regarded as dualist (in that they remain separate legal systems), it is important to note that many of the underlying premises of dualist doctrine, as traditionally constructed, no longer hold true: for instance, it cannot be said that national and international law cover entirely distinct fields of subject-matter nor that States are the only subjects of international law.

Secondly, in national legal systems, similarly, the twentieth century was defined by the rise of constitutionalism, the increasing accountability of government, including to the judiciary, in the sphere of foreign affairs, and the protection of human rights. Moreover, express reference to international law is now commonplace in national constitutions.

Furthermore, and of fundamental importance in the context of the present study, is the emergence of new zones between the strictly national, on the one hand, and the strictly international, on the other. This has been particularly obvious in Europe, with the development of the European Union, which has marked a radical departure in international organisation. However, it is also evident, in perhaps a less radical way, in the considerable influence and rich interpenetration of law and legal reasoning in Europe more broadly, particularly through the Council of Europe and specifically the European Convention on Human Rights. The range and scope of interactions to which these systems give rise are such that, while echoes of monism and dualism may occasionally be heard and offer some rough guidance, their explanatory power is considerably reduced in this very changed legal landscape.

The interaction between national law, international law and increasingly European law has gained prominence in recent times as the European Union's competence in external relations has expanded and the influence of international law within its legal system has accordingly increased. However, the multitude of interactions to which this third dimension to the traditional relationship gives rise

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[117] Jennings and Watts, note 2, at 54.

defies straightforward classification, at least within the traditional monist-dualist doctrinal paradigm. In one of the rare considerations of this issue in the scholarship, Bethelehem has offered the following insight:

> With its doctrines of direct effect and supremacy, Community law has, at one level, fundamentally reconceived the relationship between national law and "inter"-national law, at least for the Member States of the European Community. At another level, interposing itself, in many areas, between municipal law and traditional international law, Community law has become a conduit for the incorporation and application of international law in the municipal sphere. At yet another level, Community law is in the process of fundamentally reshaping the traditional boundaries of state competence with the result that, for the Member States of the European Community, the traditional interaction between international law and municipal law at the level of policy formulation has been caught up in the often bewildering dynamic of competence, that of the Community versus that of the Member State... Community law, in its origins and the methodology of its creation, is international law while at the same time being a source of law applicable in the municipal sphere and prevailing over municipal law...[118]

In light of such interactions, Bethlehem opined "that the monist-dualist dichotomy, while it may serve to explain specific transactions, is virtually irrelevant when it comes to addressing the interaction, at a systemic level, of international law, Community law and national law".[119] Von Bogdandy has gone even further and described the doctrines of monism and dualism as "intellectual zombies".[120]

In the face of these challenges, and in the wake of increasing instances of overlap and conflict in practice between the international, EU and national legal systems, a number of doctrinal responses have emerged in the literature. Some of these responses invoke the concept of constitutionalism, by extending it to the international legal system, to provide an account of the complex interaction between

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[118] Bethelehem, "International law, European Community law, National Law: Three Systems in Search of a Framework", in Koskenniemi ed, *International Law Aspects of the European Union* (Kluwer, 1998), at 169. He continues (at 174): "While a vertical, or hierarchical, framework may indeed be useful in explaining some forms of interaction between the three systems, an appreciation of the functional competence, as opposed to the territorial, personal and material scope, is likely to be as important."

[119] *Ibid*, at 174.

[120] See Von Bogdandy, "Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law" (2008) 6 *Int'l J of Const'l Law* 397.

international, EU and national legal systems.[121] While the different constitutionalist approaches vary in their premises and in their forms, they generally advocate, as de Búrca has suggested, "some kind of systemic unity, with an agreed set of basic rules and principles to govern the global realm".[122] Variants of pluralism also figure prominently in the literature, stressing the diversity which characterises these interacting legal systems. Von Bogdandy, for instance, has suggested that it is "dualism that leads the way beyond" the dichotomy between monism and dualism,[123] through a concept of legal pluralism which "does not imply a strict separation between legal regimes" but instead "promotes the insight that there is an interaction among the different legal orders".[124] Having examined constitutionalist and pluralist accounts of the 'postnational' legal order, Krisch concludes that, while not ideal, the concept of pluralism, with its focus on adaptation, contestation and checks and balances, is the best way to understand this emerging legal order.[125] Of course, both constitutionalism and pluralism are broad churches and the many varied accounts reflect deeper differences in the understanding of the underlying concepts.[126]

It is perhaps constitutional pluralism, an attempt to bridge pluralist and constitutionalist understandings, which has emerged as the most significant attempt to understand and theorise the relationship between international, EU and national law. While the term 'constitutional pluralism' has also developed many different meanings,[127] at its core is the idea that, in an era of ever-increasing overlap of legal systems, the State is no longer the sole legitimate system or 'site'[128] of constitutionalism and that the relationship between different such sites can usefully be understood in constitutional terms. Constitutional pluralism first came to prominence as an account of the relationship between EU law and the constitutional

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[121] See e.g. de Búrca, "The European Court of Justice and the International Legal Order after *Kadi*" (2010) 51(1) *Harvard J Int'l Law* 1.

[122] *Ibid.*, at 36 (providing an overview of the different approaches including the soft constitutionalist approach which she ultimately follows).

[123] Von Bogdandy, note 120, at 400. See also Besson, note 60, at 258, who describes pluralism as an "elaborate and interlocking version of dualism".

[124] Von Bogdandy, note 120, at 398.

[125] Krisch, "The Case for Pluralism in Postnational Law" LSE Law, Society and Economy Working Papers 12/2009, at 14. See more generally Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, 2010).

[126] For a wider variety of perspectives on these issues, see the contributions in Dunoff and Trachtman eds, *Ruling the World?: Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009).

[127] As Avbelj and Komarek remark, "the concept has gained so many meanings that often the participants in the debate talk past each other": Avbelj and Komarek eds, "Four Visions of Constitutional Pluralism", EUI Working Paper 2008/21, at 1.

[128] This is the term used in particular by Walker: see Walker, "The Idea of Constitutional Pluralism" (2002) 65 *Modern Law Review* 317.

law of Member States. That remains the relationship to which it has been most convincingly applied. Within the shadow of the complex legal issues and the conflicting claims to ultimate authority to which EU law's claim of supremacy over national constitutional law has given rise, constitutional pluralism offered a vision of the European legal order in which the distinct claims of the EU's and Member States' constitutional orders co-existed and could be understood in heterarchical rather than in hierarchical terms.[129] Eeckhout has gone so far as to suggest that, "in European academic literature, legal or constitutional pluralism has become the predominant concept, or even theory, for the study of the relationships between different legal systems".[130] While it is not without its critics,[131] constitutional pluralism nonetheless provides a valuable insight into the relationship and interaction between the EU and Member States' legal systems, something which was arguably lacking in the relentless focus on the search for the ultimate authority which had hitherto dominated the literature. Notwithstanding the special character of the relationship between the legal systems of the EU and its Member States, recent scholarship – in particular the work of Kumm, Maduro and Walker – has sought to extend the idea of constitutional pluralism to the broader question of the relationship between national, EU *and* international law.[132] While these accounts are theoretically elaborate in many respects, they also remain very much at an early stage of their evolution and arguably pose as many questions as they offer answers. In the following sections, these accounts are briefly set out and their contribution to understanding the relationship between national, EU and international law analysed.

Kumm, in his recent scholarship, has articulated a version of constitutional pluralism entitled 'cosmopolitan constitutionalism',[133] which brings together two strands of his earlier work, the first on the constitutional conflict within the EU

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[129] See, in particular, McCormick "Beyond the Sovereign State" (1993) 56 *Modern Law Review* 1 and McCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford University Press, 1999).

[130] Eeckhout, "The Growing Influence of European Union Law" (2011) 33(5) *Fordham ILJ* 1490, at 1518.

[131] See e.g. Baquero Cruz, "The Legacy of the Maastricht-Urteil and the Pluralist Movement" (2008) 14 *Eur LJ* 389. Certain scholars offer pluralist accounts which are not specifically constitutional pluralist: Krisch, note 125; Besson, note 60, at 258 (equating constitutional pluralism and legal pluralism).

[132] For a useful overview of these approaches and a discussion between the chief protagonists, see Avbelj and Komarek, note 127.

[133] Kumm, "The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism In and Beyond the State" in Dunoff and Trachtman eds, note 126, 258. Kumm (at 273) equates cosmopolitan constitutionalism with a theory of constitutional pluralism. See further Kumm, "How does European Union Law Fit into the World of Public Law? *Costa*, *Kadi* and Three Conceptions of Public Law" in Wiener and Neyer, *Political Theory of the European Union* (Oxford University Press, 2010), at 111.

context,[134] the second on a re-conceptualisation of the relationship between national and international law which is based on 'rules of engagement' rather than 'rules of conflict'.[135] According to Kumm, the statist paradigm, which has traditionally dominated Western legal thought, provides an "unconvincing cognitive frame" for the contemporary legal and political world.[136] Cosmopolitan constitutionalism, by contrast, purports to provide a general theory of public law integrating national and international law[137] and to offer a "principled framework for legal pluralism".[138] Kumm considers that the authority of public law, whether at the national or international level, is undergirded by a set of universal principles central to liberal democratic constitutionalism. When understood in a cosmopolitan perspective, these principles are broader than their traditional statist counterparts: thus, in relation to the principle of jurisdictional legitimacy, there is a shift from a focus on sovereignty to a focus on subsidiarity; in relation to the principle of procedural legitimacy, from democracy to standards of good governance; in relation to the principle of substantive legitimacy, towards a cosmopolitan understanding of fundamental rights.[139] According to Kumm, it is through such a system that the relative authority of each principle can be assessed in case of conflict and legal coherence ensured.[140] The practical implication of this framework, which is said to offer the most plausible account of legal practice,[141] is that "international law should presumptively be

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[134] In this work, Kumm focused on constitutional pluralism within the context of the relationship and resolution of conflicts between the European Court of Justice and national constitutional courts and put forward a framework for addressing such conflicts within a framework of 'Constitutionalism Beyond the State': see Kumm "Who is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice" (1999) 36 *CMLR* 351 and Kumm, "The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty" (2005) 11 *Eur LJ* 262.

[135] In this work, Kumm suggested that there were certain common constitutionalist principles which established a normative framework for assessing and guiding national courts in their attempt to engage international law in a way that does justice both to their respective constitutional commitments and the increasing demands of an international legal system: the formal principle of international legality, the jurisdictional principle of subsidiarity, the procedural principle of adequate participation and accountability as well as the substantive principle of achieving outcomes that do not violate fundamental rights and are reasonable. See Kumm, "The Legitimacy of International Law: A Constitutionalist Framework of Analysis," (2004) 15 *EJIL* 907 and Kumm, "Constitutional Law Encounters International Law: Terms of Engagement," in Sujit Choudhry ed, *The Migration of Constitutional Ideas* (Cambridge University Press, 2006), at 256.

[136] Kumm, note 133, at 323. In this regard, Kumm states (at 279) that his account is neither monist in that the potential for "legally irresolvable conflict between national and international law remains" nor dualist because the relationship is "reconceived in light of a common set of principles that play a central role that palay a central role in determining the relative authority of each in case of conflict, thus ensuring legal coherence".

[137] *Ibid.*, at 264.

[138] *Ibid.*, at 274.

[139] *Ibid.*, at 290-310.

[140] *Ibid.*, at 279.

[141] *Ibid.*, at 311-313.

applied even against conflicting national law, unless there is a sufficiently serious violation of countervailing constitutional principles relating to jurisdiction, procedure, or substance".[142] While Kumm's account offers an attractive vision of a global public law and undoubtedly draws attention to important features of the contemporary legal landscape, the reliance on this framework of very loosely-defined principles and the uncertainties which would inevitably follow in its practical operation leave many questions unanswered. By way of example, highly relevant to the present study, it is unclear how such a framework of principles would integrate an express national constitutional rule governing the implementation of international law. Kumm suggests that such a rule "will itself be a legally relevant fact that weighs against the application of international law because of its connection with procedural legitimacy" but it will not be conclusive.[143] Yet, following through on this example, one need only consider how this might work in the case of Article 29.6 of the Irish Constitution which expressly lays down a rule diametrically opposed to the presumption of cosmopolitan constitutionalism. The indeterminacy of such an approach and the risk of it clouding rather than clarifying the choices involved in implementing international law detract significantly from its apparent attractiveness and from its practical utility.

A different vision of constitutional pluralism is evident in the work of Maduro, who has focused primarily on the European Union context and, in particular, on the perspective of the courts. In setting out this vision, Maduro has used the analogy of counterpoint, the "musical method of harmonizing different melodies that are not in a hierarchical relationship with each other".[144] In simple terms, constitutional pluralism is said to operate in practice by promoting communication and thereby reducing conflict between different legal regimes. Once again using certain framework principles – in this case, pluralism itself, coherence, universalisability, institutional choice – this approach requires different regimes to recognise and adjust to each other.[145] Although initially developed within the specific context of the relationship between the EU and Member States' legal systems,

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[142] *Ibid.*, at 277.
[143] *Ibid.*, at 277.
[144] See especially Maduro, "Contrapunctual Law: Europe's Constitutional Pluralism in Action" in Walker ed, *Sovereignty in Transition* (Hart Publishing, 2003), at 501. In this account, Maduro describes how the constitutional framework of the EU was constructed through a cooperative process between the Court of Justice and a large group of other actors, including national courts. The relationship between these bodies cannot be understood in purely hierarchical terms but instead must be understood in pluralist terms, the constitutional dimension of which is derived from pluralism being a mechanism of limiting power.
[145] *Ibid.*

Maduro has since broadened his approach so as to bring the wider relationship with international law within its remit.[146] In this regard, Maduro contrasts "internal pluralism", such as that within the EU, with "external pluralism" which "derives from the increased communication and interdependence among different legal orders, both state and supranational or international legal orders".[147] In the context of internal pluralism, Maduro considers that there must be some form of common language or a voluntary agreement on a basic set of meta-methodological rules,[148] resulting in the recognition and adjustment of each legal order to the plurality of equally legitimate claims of authority made by other legal orders and, in the case of jurisdictional conflicts, requiring courts to frame their decisions accordingly. In short, there is a common commitment to the "integrity and coherence of the legal order".[149] However, in the context of external pluralism, there is "no order of orders" supported by a commitment to a particular political community and thus no common commitment or allegiance on the part of courts to the decisions of other legal orders.[150] What external pluralism requires is for courts to "take account of their legal order's external commitments and openness and of the need to negotiate their effectiveness with other jurisdictions" and, to this end, to "interpret the law, as far as possible, in a manner that minimises potential jurisdictional conflicts".[151] Moreover, whereas with internal pluralism courts seek some form of systemic compatibility among the relevant legal regimes, with external pluralism the most courts could be expected to do would be to undertake a "case-by-case assessment of the functional equivalence" of a particular international rule or system with which they are confronted.[152] In both cases, however, the objective of the courts is the same: not to change their constitutional allegiance but to adjust their forms of reasoning and institutional roles to their new constitutional context.[153] According to Maduro, institutional awareness and modesty necessarily express themselves in forms of jurisdictional deference. Of course, it is not only in academic literature that Maduro has developed these ideas but also during his time as Advocate-General at the

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[146] Maduro, "Courts and Pluralism; Essay on a Legal Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism" in Dunoff and Trachtman eds, note 126, at 356.
[147] *Ibid.*, at 357.
[148] *Ibid.*, at 374.
[149] *Ibid.*, at 374.
[150] *Ibid.*, at 375.
[151] *Ibid.*, at 376.
[152] *Ibid.*, at 379.
[153] *Ibid.*

European Court of Justice.[154] In particular, in his Opinion in the *Kadi* case,[155] Advocate-General Maduro stressed that the EU courts must not be institutionally blind[156] and that EU and international law must not "pass by each other like ships in the night";[157] moreover, this Opinion seemed to indicate an openness to the international legal system in its suggestion that, if an effective mechanism of judicial control was available at the UN level, this might relieve the EU of its obligation to provide a similar judicial control in its internal legal system.[158] However, ultimately, Advocate-General Maduro concluded that it was for EU law itself to determine the effect of international law within its internal legal system,[159] and that in the case at hand, the Court must undertake a full review of the EU measures implementing UN Security Council resolutions by reference to their compatibility with fundamental rights, a conclusion which demonstrates how fine the line might often be between constitutional pluralism and more traditional forms of dualism.[160] However, the main problem with Maduro's account is its focus on the role of courts specifically and it is in this respect that it fails to translate effectively to the international legal system. If certain international regimes – such as the ECHR and WTO – have relatively highly-developed judicial or quasi-judicial control mechanisms, most other regimes (including the United Nations system for that matter) and international law generally lack such mechanisms. Walker's comment - that "for all their awareness in principle of the involvement of other institutions, ... the majority of commentators have in fact homed in on the courts as the most visible arena and the clearest manifestation of the problem"[161] – is particularly true of Maduro's account. Although he has occasionally

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[154] Maduro served as Advocate-General at the Court of Justice between 2003 and 2009.

[155] Joined Cases C-402/05 P and C-415/05 P *Kadi and Al-Barakaat* [2008] ECR I-06351.

[156] [2008] ECR I-06351, at para. 44.

[157] *Ibid.*, at para. 22.

[158] *Ibid.*, at para. 54.

[159] *Ibid.*, at para. 23 ("Yet, in the final analysis, the Community Courts determine the effect of international obligations within the Community legal order by reference to conditions set by Community law...") and para. 24 ("....Although the Court takes great care to respect the obligations that are incumbent on the Community by virtue of international law, it seeks, first and foremost, to preserve the constitutional framework created by the Treaty. Thus it would be wrong to conclude that, once the Community is bound by a rule of international law, the Community Courts must bow to that rule with complete acquiescence and apply it unconditionally in the Community legal order. The relationship between international law and the Community legal order is governed by the Community legal order itself and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community").

[160] See Besson, note 60, at 260, describing Maduro's approach as "a blueprint of European legal pluralism" and a "legal pluralism [that] is total" but noting that it "comes very close to dualism".

[161] Walker, "Constitutionalism and Pluralism in Global Context", RECON Online Working Paper 2010/03, at 7 (noting that "this tendency has probably been accentuated by the fact that one of the more influential pluralist thinkers, Miguel Maduro, has served as an Advocate-General at the European Court of Justice, and has delivered opinions which seem to reflect some of his academic thinking").

addressed pluralism in broader terms,[162] Maduro's account remains firmly wedded to a vision of legal orders in which courts play a central role, such as one finds in the European Union.

Walker was one of the first scholars to extend constitutional pluralism beyond the confines of the EU legal system and to situate it more broadly within a 'post-Westphalian world' characterised by overlapping legal orders.[163] For Walker, constitutional pluralism does not simply involve an explanatory or normative claim;[164] it is a "collective framing exercise" which makes an epistemic claim, in the sense that, among the plurality of constitutional sites or processes which exist in the post-Westphalian context, each has a different "way of knowing and ordering, a different epistemic starting point".[165] This implies an "incommensurability of the knowledge and authority (or sovereignty) claims emanating from these sites" yet these sites are capable of being connected through "the meta-language of constitutionalism", a means of accommodating each other.[166] In a recent paper, Walker squarely confronts the challenge of extending constitutional pluralism from the EU context, "a kind of regional comfort zone for the ideas of constitutional pluralism" in which it enjoys "immediate plausibility",[167] to the global context, "a less obviously receptive environment".[168] Observing that some scholars have embraced constitutionalism as a means of re-establishing hierarchy at the international level, Walker contends that, because of the fragmented and disorderly nature of the international order, constitutionalism "in the singular mode, cannot achieve its own ambition".[169] Nevertheless this fragmentation and disorder is what makes that order "pluralism friendly".[170] Referring to two distinct discourses of constitutionalism – constitutionalism as doctrine and constitutionalism as imagination – Walker acknowledges the difficulty of identifying "the constitutional causeways" which connect different constitutional sites[171] but argues that "the less site-specific we understand constitutional authority to be, the less problematic we

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[162] See Maduro's contribution to the debate in Avbelj and Komarek, note 127, at 5-6.
[163] See Walker, note 128. See also Walker, "Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders" (2008) 6 *International Journal of Constitutional Law* 1.
[164] Walker, note 128, at 337 (empirical "in the sense that it offers a more accurate description and explanation into the workings of the legal order in an era of globalization" and normative "in the sense that it offers an "acceptable ethic of political responsibility ...premised upon mutual recognition and respect between national and supranational authorities").
[165] *Ibid.*
[166] *Ibid.*
[167] Walker, note 161, at 6.
[168] *Ibid.*, at 8.
[169] *Ibid.*, at 9.
[170] *Ibid.*, at 8.
[171] *Ibid.*, at 11.

conceive constitutional movement across boundaries, and the less sharply framed the original definitive questions of constitutional pluralism appear".[172] Ultimately, he suggests that constitutionalism in this global context "remains a relevant conceptual point of departure" if it is understood simply as referring to "the continuing relevance of constitutionalism in addressing the mix of empirical and normative factors which contribute to the deep pluralism of the emerging global order".[173] At once the most highly theoretical and the most grounded of the three contributions, Walker's account clearly highlights the limits of applying constitutional pluralism to the global level. In short, it demonstrates that, when so applied, constitutional pluralism would play a considerably more modest role than is the case within the specific context of the EU, a role which arguably would offer little direction in the practical working out of the complex relationships between the different legal systems at play.

Unsurprisingly the extension of constitutional pluralism to the international legal system by scholars such as Kumm, Maduro and Walker has not gone without criticism. The most pertinent critique, for present purposes, is that of Besson, writing in the wake of the first *Kadi* case.[174] Sounding caution that "legal pluralism should not too readily be applied to all relationships between legal orders and to all legal orders", Besson has emphasised that questions of legal validity and hierarchy of norms are "not contingent matters" but are in fact related to "the legitimacy of legal orders and norms".[175] While pluralism might be "the right model to capture the integrated nature of the European legal order", Besson argues that it is not the right model for the relationship between international law and EU law because international law-making "lacks the democratic dimension necessary to backup a claim to immediate validity and to constitutional rank within the European legal order".[176] She continues, with a comment that has particular resonance for 'dualist' systems such as that of Ireland:

> Paying due attention to that democratic requirement appears even more essential in an integrated legal order where validity in EU law also implies immediate validity within member states' national legal orders and democratic polities.[177]

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[172] *Ibid.*, at 19.
[173] *Ibid.*, at 19.
[174] Besson, note 60.
[175] *Ibid.*, at 260.
[176] *Ibid.*, at 262.
[177] *Ibid.*

On this basis, Besson advocates a doctrine of "European pluralist dualism" while not excluding that, as the international legal order develops, the reach of pluralism may also expand.

Constitutional pluralism undoubtedly offers insights into the complex interactions between national, EU and international law but, even leaving aside issues relating to the vagueness or uncertainty of its various formulations,[178] it has clear limits in serving as a general account of the relationship between these legal systems. In the first instance, there are concerns of democratic legitimacy, such as those expressed by Besson, which become all the more acute when constitutional pluralism is extended from a purely EU context to a more global context. Secondly, the focus on the role of courts, a tendency expressly acknowledged by Walker and which is clearly present in Kumm's and Maduro's accounts, may well reflect the issues which arise within the EU context but they fail to do justice to the decentralised and largely underdeveloped judicial infrastructure of international law more generally. Thirdly, and perhaps most significantly, the accounts of constitutional pluralism in a global context which have so far emerged, while sometimes acknowledging the diversity of international law, do not take seriously the challenges posed by this diversity. This is evident in the over-reliance on the cases of the ECHR, the WTO or even the UN, each of which has many special characteristics which are not necessarily shared by other special regimes or by international law generally. It is also evident in the paucity of practical instances of interaction which are discussed in these accounts, the *Bosphorus* and *Kadi* cases being rare exceptions.[179] Moreover, there is little consideration of the special problems posed by customary international law. While constitutionalism, understood in a very broad sense, may be a useful way of understanding certain international regimes or even international law as a whole, constitutional pluralism in its current formulations runs the serious risk of ignoring the very real diversity of international law. If, in its more highly developed formulations, it may shed light on the interaction of national and EU law with specific international regimes (such as the ECHR or the UN), when it is understood in a more general and much looser sense (such as that ultimately taken by Maduro or Walker), it amounts to little more than an open-textured dualism. In conclusion, it is suggested that, while it is certainly not without its interest or

[178] In this context, it is appropriate to refer to the critique of Baquero Cruz, speaking within the context of the EU legal system but relevant to constitutional pluralism generally, that the uncertainty inherent in constitutional pluralism potentially poses the serious risk of undermining the rule of law, legal certainty and the protection of fundamental rights: see Baquero Cruz, note 131, at 414.

[179] See e.g. Kumm, note 131, at 279-288; Maduro, note 126, at 378; Walker, note 161, at 9.

insights, and represents an important contribution to the analysis of these difficult issues, constitutional pluralism is not successful as an account or explanation of the complex, multifaceted and dynamic relationship between national, EU and international law. As a result, this thesis suggests that it is necessary to go beyond universalising doctrines - such as monism, dualism and even constitutional pluralism – in order to focus instead on understanding these changing relationships in spatial terms. The relationship may certainly be understood as constitutional but in the more limited sense that international law provides internal legal systems – in this case, that of the EU and its Member States – a constitutional space within which to give effect to their external commitments. Constitutional pluralism may have a role to play in understanding the relationship between these internal legal systems but not in understanding their relationship with the international legal system. It is suggested that such an approach best captures the changing framework which is at the heart of this thesis.

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Ultimately, the relationship between national and international law "does not form a single problem but is a very complex and complicated one".[180] Greig has commented:

> International law and municipal law have so many points of contact, especially with the gradual extension of the rules of the former to cover situations hitherto considered solely the concern of the latter, that the adoption of an a priori approach will either result in the over-simplification, or the distortion, of what is basically a complex problem.[181]

Thus, as international law increasingly requires implementation within national legal systems, this complexity intensifies.

The issue of national implementation – or the place of international law within national legal systems – is just one facet, but a central facet, of the complex problem of the relationship between national and international legal systems. As we have

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[180] Verzijl, note 82, at 90.

[181] Greig, note 82, at 53. Similarly, Arangio-Ruiz (note 82, at 946) has observed more recently:

> ... the problem of the relationship between international law to municipal law is at present more urgent and acute ... than it was in the past. It simply arises more frequently and in a far greater variety of contexts and modes. It is so not just before national courts and international tribunals but also before national or international administrative or political organs.

Similarly, Cassese, having noted the influence of philosophy and idology on the approaches adopted in national legal systems and rejected the applicability of any specific doctrine, stated that "in short, international law no longer constitutes a sphere of law tightly separate and distinct (subject to one or two exceptions) from that of national legal systems....[it] has huge daily impact on systems": Cassese, note 82, at 298.

seen, monism and dualism present two extremely different alternatives for its resolution. While the terms are often used to define aspects of the tripartite (or triangular or trinitarian) relationship between national, European and international law, their explanatory power in that context is very limited. Beyond serving as a shorthand for a basic attitude to international law or the mechanics of its implementation, the continued utility of the doctrines of monism and dualism is open to question. In the context of implementation of international law within the legal systems of European Union and its Member States, the doctrines arguably deflect attention from the central questions which are what is required by international law, (by which the States and Union are externally bound), what is required by the systems' constitutional law (by which they are internally bound and which defines the limits within which they can act), and how best to harmonise, connect or reconcile these sometimes complementary, sometimes competing, requirements. This central question presents complex problems of interaction and translation between the legal systems and political as well as legal dimensions which the traditional doctrines only poorly accommodate. These issues are explored in more detail in the following section which seeks to re-focus the question which has long been answered in monist or dualist terms.

IV. THE INTERNATIONAL LAW FRAMEWORK

In order to move beyond the doctrines of monism and dualism in understanding the implementation of international law within internal legal systems, it is necessary to re-focus the analysis of that process. To do so, it is important to examine the requirements of international law with respect to its implementation in internal legal systems, whether of States such as Ireland or of entities such as the EU.

Notwithstanding the transformation in many areas of international law over the past century, the international legal system continues to be rooted in the sovereignty of States. As an aspect of this sovereignty,[182] "it is in principle for the

[182] According to Wildhaber and Breitenmoser, such an approach respects "the sovereignty and autonomy of organisation of the states": Wildhaber and Breitenmoser, "The Relationship between Customary International Law and Municipal Law in Western European Countries" (1988) 48 *ZaöRV* 163. They note (at 164) that "...general international law leaves the arrangements of the relationship between international law and municipal law by way of a renvoi to municipal law and in this manner recognises the sovereignty and autonomy of organisation of the states" and that "[it] demands to be implemented one way or another [but] it is not concerned with the method of achieving this result."

legal system of each State to provide the most appropriate ways and means for ensuring that international law is applied at the national level".[183] In the context of the dominant theoretical dichotomy, Verzijl observed that "....international law grants sovereign States a wide degree of choice of methods in this field without attributing any absolute value to either the monistic or the dualistic doctrine".[184] Moreover, international law "does not impose its priority as such on municipal law"[185] or "contain any general rule according to which customary international law and treaty law are to be supreme in the sphere of municipal law and directly binding on State organs and citizens alike, and the risk of certain abuses may even to some extent reduce the desirability of such a rule".[186]

This allows the international legal system to recognise, as it must, a wide diversity of constitutional systems, which often differ markedly in their organisation of government generally and their approach to implementation of international law within their internal legal orders particularly.[187] Such deference follows inexorably from the fundamental principle of sovereignty, and the diverse political, cultural and legal heritage of States. Of course, an important chapter in the story of international law in the past century has been the development of limitations on this sovereignty in the interest not only of stable and peaceful international relations (most importantly, in the prohibition of the use of force in the United Nations Charter) but also of the rights and freedoms of individuals regardless of the system of government under which they live (through the growth of international human rights law).[188] In any event, whatever a state's particular system of government, virtually all modern constitutional systems, including those of EU Member States, are characterised, at least in theory, by a system of government based on the doctrine of the separation of

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[183] See Preamble, recital 3, Resolution of the Institute of International Law (Milan Session, 2003) on the Activities of National Judges and the International Relations of their State. See also Dominicé and Voeffray who observe that "in principle international law does not impose any particular obligations on States with regard to the integration of international norms in the domestic order, so that each State is free to organise this as it wishes": Dominicé and Voeffray, "L'application du droit international général dans l'ordre juridique interne" in Eisemann ed, note 46, 51.

[184] Verzijl, note 82, at 93.

[185] Wildhaber, note 182, at 164.

[186] Seidl-Hohenveldern, note 40, at 89ff.

[187] See e.g. Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV)): "Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State". See also the Preamble of the Vienna Convention on the Law of Treaties, emphasises the importance of international cooperation through treaty relations between States "whatever their constitutional and social systems".

[188] However, while it has been suggested that there is an emerging right to democratic governance in international law (Franck, "The Emerging Right to Democratic Governance" (1992) 81 *AJIL* 46), this is not reflected in the reality which prevails in the contemporary international community.

powers. Taking the example of a unitary state with a parliamentary system, such as Ireland, while the legislature makes laws, the executive organ is generally charged with the power to conduct foreign affairs. In such a scheme, international law-making clearly gives rise to potential friction between the legislative and executive powers of government. Shaw, discussing the legal system of the United Kingdom, identifies the ensuing constitutional difficulty which is present in many legal systems:

> ...[W]ere treaties to be rendered applicable directly within the state without any intermediate stage after signature and ratification and before domestic operation, the executive would be able to legislate without the legislature.... Indeed, as far as this topic is concerned, it seems to turn more upon the particular relationship between the executive and legislative branches of government than any preconceived notions of international law.[189]

As we have already seen, insofar as Ireland is concerned, this is reflected in Article 29.6 of the 1937 Constitution. However, as the Irish, and other Member States', constitutional structures have adjusted to accommodate the European Treaties, the 'separation of powers' presents a far more complex picture, along axes which are both horizontal (as between the EU institutions themselves, the 'institutional balance') and vertical (as between the EU institutions and Member States).

Nevertheless, when they actively engage in the international community, thereby becoming bound by general international law, and when they subscribe to specific international obligations, States undoubtedly limit their freedom of action, including within their internal legal systems.. The observations of Verzijl in this context are again insightful:

> Even allowing for a large measure of freedom for individual States to frame their national constitutional law along dualistic and monistic lines as they think fit, one principle is inescapable viz. that, whatever the legal situation in the municipal order may be, a State can never seek shelter behind that situation in order to escape the legal consequences that follow from its disregard of the basic subordination of municipal law to public international law on the inter-state level...[190]

Similarly, as Waldock stated, "internal law and the administration thereof are matters of domestic jurisdiction but when the State subjects itself to international law, it is no

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[189] Shaw, note 82, at 135-6.
[190] Verzijl, note 82, at 96.

longer exclusively national law and deficiencies in national law are no excuse [for non-performance]...".[191] Thus, while international law affords considerable freedom to internal legal systems in their approach to its implementation, this freedom is not unlimited.

In the first instance, the State is bound to respect international law, including general international law, and is responsible for any acts or omissions in breach thereof.[192] This responsibility is the corollary of the State's binding obligation under international law. The principles of state responsibility, as recently codified by the International Law Commission in its Articles on the Responsibility of States for Internationally Wrongful Acts, make it clear that, in terms of Article 32 of those Articles, "the responsible State may not rely on the provisions of its internal law as justification for its failure to comply with its obligation ...".[193] If the state fails to respect international law, its international responsibility may thus be invoked.

This principle is reflected in the international law of treaties as codified in the Vienna Conventions on the Law of Treaties. The fundamental principle underlying the law of treaties is *pacta sunt servanda*, that what has been agreed must be respected.[194] Treaties, as Reuter has simply put it, are "made to be performed".[195] While international law pays due deference to States' internal legal systems, Article 27 of the Convention provides "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". This is without prejudice to Article 46 of the Convention which provides, in its first paragraph, that "[a] State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of

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[191] Waldock, note 82, at 86.

[192] See Chapter I of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts. See generally Crawford ed, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002).

[193] Article 32 (irrelevance of internal law), International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts.

[194] This long-standing principle of customary international law is codified in Article 26 of the Vienna Convention on the Law of the Treaties which provides that "every treaty in force is binding upon the parties to it and must be performed by them in good faith".

[195] P. Reuter, *Introduction to the Law of Treaties* (2nd rev. English ed, Kegan Paul International, 1995) para. 44. In the *Exchange of Greek and Turkish Populations Opinion*, the Permanent Court of International Justice discussed the matter as follows: "[It is] self-evident that a State which had assumed valid international obligations was bound to make such modifications as were necessary to ensure their fulfilment. This flows directly from its duty to perform a treaty in good faith": (1925) PCIJ, Series B, No. 10, at 20.

its internal law of fundamental importance".[196] Thus, it is only in rare circumstances that internal law may operate to invalidate the State's consent to be bound in international law.

Moreover, for these purposes, the State encompasses "any State organ ... whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State and whatever its character as an organ of the central government or of a territorial unit of the State".[197] Thus international law adopts a unitary conception of the State and, accordingly, an 'internationally wrongful act' of the Irish courts, as well of the Government or the Oireachtas, involving the breach of State's obligations, could engage Ireland's international responsibility. Thus, while, for example, the national judiciary may not always regard itself as having a role in upholding the state's international obligations, such matters traditionally coming within the executive sphere, its actions, if in breach of those obligations, may nevertheless trigger the state's international responsibility. This is illustrated by a number of recent cases which have come before the International Court of Justice.[198] It is therefore important that the judiciary, as well as the legislature and the executive, while respecting their constitutionally defined roles, are conscious of the implications of their activities in international law.[199] Such issues may call for the coordination of powers of government and not simply their separation.

Although the general principle remains that States are free to give effect to international law within their legal orders as they see fit, increasingly treaties by their very terms may require some form of implementation within parties' legal systems in order to be performed in good faith. As Reuter remarked, while "it is up to each State and its Constitution to ensure the correct application of treaties", "there is nothing to prevent a treaty from restricting, in a given case or in a whole series of cases, the freedom of States to do so".[200]

In the Irish context, the most obvious example of a treaty which lays down specific requirements which States must meet within their internal legal systems is

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[196] Paragraph 2 of Article 46 provides that "[a] violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."
[197] Article 4, International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts.
[198] See e.g. *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Reports 62 and *Avena and Other Mexican Nationals (Mexico v. United States of America)* [2004] ICJ Reports 121.
[199] See Resolution of the Institute of International Law, note 183.
[200] Reuter, note 195, para. 46.

the European Treaties, as they have been interpreted by the European courts. These Treaties demand far-reaching modification of the existing legal framework, constitutional, legislative and otherwise, in order to be given full effect.

Many treaties require that a State take, for example, particular legislative action in order to give effect to its provisions.[201] In relation to other treaties, the requirements for specific internal measures may be less clear-cut. Thus, in respect of the European Convention on Human Rights, this requirement is not expressly laid down in the Convention and the practice of the European Court of Human Rights and Contracting Parties indicates otherwise. The Court stated, in *Ireland v. United Kingdom*,[202] that the intention of the drafters was that the rights and freedoms laid down in the Convention were to be directly secured to individuals in the Contracting States. It continued by stating that "[t]hat intention finds a particularly faithful reflection in those instances where the Convention has been incorporated into domestic law".[203] Despite much discussion over the intervening half-century, it was not until 2003 that steps were taken to give the Convention effect –in its short title's phrase 'further effect' - in Irish law through the European Convention on Human Rights Act. Even then, the Act of 2003 did not give full effect to the Convention.[204] Thus, while desirable, implementation of the Convention within the Irish legal system was not strictly required by its terms. As it happened, however, its impetus for its implementation ultimately derived from another international obligation, in the form of the Belfast Agreement.[205] Other international human rights treaties at the universal level, to which the State is a party, pose similar challenges. The bodies established by these treaties have on a number of occasions elaborated on those treaties' requirements with respect to domestic implementation.[206] The prospect of

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[201] The Genocide Convention is a clear example of this, Article V thereof requiring parties to the Convention "to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III". In Ireland, such legislation was enacted in the Genocide Act, 1973.

[202] *Ireland v United Kingdom* (1978) 2 EHRR 25.

[203] *Ibid.*, para. 239. Although Ireland was one of the first states to sign and ratify the Convention, the Irish Courts declared that Article 29.6 was, in the words of Maguire CJ in *Re Ó Láighléis*, an "insuperable obstacle" to giving the Convention effect within Irish law: *Re Ó Láighléis* [1960] IR 93, at 124.

[204] See the judgment of Murray CJ in *McL. v. D.* [2009] IESC 81.

[205] See Hogan, "The Belfast Agreement and the Future Incorporation of the European Convention of Human rights in the Republic of Ireland" (1999) 4(4) *Bar Review* 205.

[206] Thus, for example, in its General Comment No. 3, the Human Rights Committee, charged with monitoring compliance with the ICCPR, declared: "...article 2 of the Covenant generally leaves it to the States parties concerned to choose their method of implementation in their territories within the framework set out in that article. It recognizes, in particular, that the implementation does not depend solely on constitutional or legislative enactments, which in themselves are often not per se sufficient."

domestic implementation has formed a continuous theme in the Irish debate in relation to such treaties.[207]

Notwithstanding a movement towards increased specification of national implementation requirements in certain classes of treaties, the general position under international law remains that States are free, unless they otherwise agree, to choose the manner in which they implement their treaty obligations within their internal legal systems (if indeed, they do so at all). However, in doing so, regard must be had to their obligations under international law because, in the case of breach of such obligations, internal law is no excuse. A balance must therefore be struck between the duty to respect international law, on the one hand, and the freedom to regulate constitutional matters, on the other. This freedom, and the search for a proper balance, is reflected in the diversity of approaches taken by States to implementation of international law within their internal legal systems.

Although there are a wide range of approaches to implementation of international law – and it is impossible, in this context, to conduct any meaningful study of the many and varied approaches taken – there are certain patterns evident which shed light on the common issues arising in the implementation of international law in internal legal systems, which may be useful to examine briefly before considering the Irish and European Union approach to implementation in detail. Certain characteristics of legal systems – such as whether they are based on the common or civil law, whether they relate to unitary or federal states, with written or unwritten constitutions, which may or may not expressly refer to international law – inevitably affect the approach taken to implementing international law.

The Committee on Economic, Social and Cultural Rights is instructive in its General Comment No. 9 dealing with the domestic application of that Covenant: "... the Covenant adopts a broad and flexible approach which enables the particularities of the legal and administrative systems of each State as well as other relevant considerations to be taken into account. But this flexibility coexists with the obligation upon each State party to use all the means at its disposal to give effect to the rights recognized in the Covenant ... Thus the Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress or remedies must be available to any aggrieved individual or group and appropriate means of ensuring governmental accountability must be put in place." Some of the more specialised human rights conventions require particular forms of action. Thus, Article 4 (a) and (b) of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) requires States "to undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination". In its General Recommendation No. I, it found that certain Member States' legislation "did not include the provisions envisaged in Article 4 ..., the implementation of which ... is obligatory under the Convention for all States parties". This was later reiterated in General Recommendation No. VII dealing specifically with "legislation to eradicate racial discrimination". On the status of general comments, see Conway, "Normative Instruments in International Human Rights Law: Locating the General Comment" NYU Center for Human Rights and Global Justice Working Paper No. 17/2008.

[207] For a recent example, see Irish Human Rights Commission, Submission on Examination of Ireland's Third Periodic Report on the ICCPR (June 2008), at 5-13, available online at www.ihrc.ie.

In the case of the implementation of treaties in internal legal systems, a number of different mechanisms are commonly used within Member States of the European Union (and indeed beyond):[208] in some systems, such as France, Belgium and the Netherlands, once the treaty becomes binding on the State as a matter of international law, it automatically forms part of domestic law; in other systems, such as Germany and Italy, some degree of legislative action or parliamentary approval is first required before the treaty is deemed to form part of the law; in others still, such as Ireland, the United Kingdom and Denmark, the treaty must be specifically given effect or 'transformed' through national law. However, even in systems in which treaties automatically, or upon mere parliamentary approval thereof, become part of the law without further legislative action, their provisions will, depending on the attitude of the courts, not always be regarded as self-executing or having direct effect. As Jacobs points out:

> A facile distinction between "monist" and "dualist" systems may conceal the fact that the practice of the courts even in "monist" systems may fail to give effect to treaties which are binding under international law.... While conversely in "dualist" systems the courts may sometimes give some effect, albeit limited, even to unincorporated treaties...[209]

Thus, while certain broad divisions appear in the approach to treaty implementation according to the family of legal systems of which individual systems form part, each case must be considered in light of its own specific constitutional rules and, often as importantly, the practice which has developed under those rules.

Similar considerations apply in respect of customary international law. Through the common law, the traditional approach of the United Kingdom has taken root in national legal systems across the world.[210] That approach is perhaps best

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[208] In sketching this overview, I have drawn on the valuable discussion in Jacobs, note 109, at xxiv-xxv.

[209] *Ibid.*

[210] Thus, for example, this approach is followed in Commonwealth countries: Australia (see e.g. Crawford and Edeson, "International Law and Australian Law", in Ryan ed, *International Law in Australia* (2nd ed, Law Book Co., 1984), 71); Canada (see e.g. McDonald, "The Relationship between International Law and Domestic Law in Canada" in McDonald, Morris and Johnston eds, *Canadian Perspectives on International Law and Organization* (Toronto, 1974), 88); New Zealand (see e.g. Dunworth "Hidden Anxieties: Customary International Law in New Zealand" (2004) 2(1) *NZJPIL* 67); South Africa (Dugard, *International Law: A South African Perspective* (3rd ed, Kluwer, 2006), Ch.3). In the United States, in contrast to its provision for treaties which form part of the supreme law of the land, the Constitution makes no express reference for general international law. Much of the debate in that jurisdiction has centred on the federal character of the United States legal system, which raises the question of the level at which general international law comes into the legal system, whether as state or federal common law. Although it has come under attack (see, in particular, Carter and Goldsmith, "Customary International Law as Federal Common Law: A Critique of the Modern Position" (1997) 110 *Harv LR* 815-876.), the 'modern position', that it enters at the level of federal

encapsulated in the oft-cited and deceptively simple maxim of Blackstone that "the law of nations ....is here adopted in its full extent by the common law, and is held to be a part of the law of the land".[211] Although its implications have been hotly debated (particularly whether it involves the incorporation or adoption of customary international law into national law *per se* or requires specific domestic acts of transformation), the core principle has long been accepted.[212] The maxim that the law of nations is the law of the land is, as Dominicé and Voeffray note, "almost universally respected", reflecting the practice beyond the common law world and in many civil law jurisdictions.[213] Moreover, it has frequently come to be enshrined in national constitutions. Thus, provisions such as that of Article 25 of the German Basic Law, 1949, that "the general rules of public international law are an integral part of federal law", [214] are common, albeit in different forms.[215] Nevertheless, as in the case of treaties, and perhaps even more so, its particular import and effect differs radically in various legal systems because even in systems setting out a seemingly

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common law, has received wide support (see Henkin, "International Law as Law in the United States" (1984) *Michigan LR* 1555 and American Law Institute, *The Restatement (Third) of Foreign Relations Law of the United States*). In any event, the statement of Justice Gray in *The Paquete Habana* (1900) 175 U.S. 677, 700 - that "international law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination" - echoes Blackstone's maxim and, while again its implications have not always been entirely clear, the core principle is uncontroversial. In systems following the common law model, the status of general international law is limited insofar as it cedes way to conflicting domestic legislation. Although the effect of this displacement is mitigated by the interpretive presumption against any such conflict, it nevertheless reduces significantly the status of general international law within such legal systems.

[211] Blackstone, *Commentaries on the Laws of England*, Book IV, Chapter V.

[212] See, for example, Jennings and Watts, note 2, 56-58; Brownlie, note 82; Shaw, note 82. See also Lauterpacht "Is International Law a Part of the Law of England?" (1939) 25 *Trans. Grot. Soc.* 51, Collier "Is International Law Part of the Law of England?" (1989) 38 *ICLQ* 924 and Capps "The Court as Gatekeeper: Customary International Law in English Courts" (2007) 70 *Modern Law Review* 458.

[213] Placing this within the context of the broader doctrinal debate of the relationship between national and international law, Dominicé and Voeffray note that the theories of monism and dualism are outdated and national solutions differ: see note 183, at 55.

[214] See the country report for Germany by Frowein and Oellers-Frahm in Eisemann ed, note 46.

[215] See e.g. Article 9 of the Austrian Constitution ("the generally recognised principles of international law are valid parts of federal law"; Article 28.1 of the Greek Constitution of 1975 ("generally recognised rules of international law form an integral part of national law"); and Article 8.1 of the Portuguese Constitution of 1976 ("norms and principles of general international law form an integral part of Portuguese law") Slightly more nuanced is Article 10 of the Italian Constitution ("[t]he Italian legal order conforms to the generally recognised rules of international law"). Sometimes, the reference is more oblique again as in the French system where it is through the Preamble of the French Constitution of 1946 – which expresses the French Republic's "respect for the general rules of public international law"– that the Conseil constitutionnel has recognised general international law as forming part of the French constitutional law or *bloc de constitutionnalité*. See the relevant contributions in Eisemann, ed, note 46. Many other systems, such as Belgium, Denmark, Spain and Luxembourg, make no explicit reference to customary international law but it is recognised as forming part of domestic law.

clear constitutional rule, this clarity is often attenuated in practice.[216] National constitutions "do not adopt a unitary and homogeneous stand towards international custom".[217]

Within the European Union, while a certain amount of common ground is evident across Member States and the Union itself in respect of customary international law, the approaches to implementation of treaties present a significant divergence between 'monism' and 'dualism', as those labels are generally used within national legal systems. In light of the EU's increased role in treaty-making and the effect of EU law within national legal systems, there is thus a clear potential for conflict between these approaches. If the EU approach may be broadly described as 'monist', the scope for tension with the approaches of 'dualist' systems such as the U.K. and Ireland is clear. In any event, moving beyond such labels, the nature of the allocation of powers between the EU and Member States in international relations is such that the constitutional position insofar as the implementation of international law is concerned is one of considerable complexity. It is within this complex constitutional framework that the balance between respect for international law and other constitutional values must now be struck.

V. CONCLUSION

Cassese has observed that "the choice of mechanisms for implementing international rules within national legal systems is the acid test for establishing to what extent States are open to international law".[218] Superficially at least, the growing role of the EU in international relations, as it affects the Irish legal system, may be presented as a clash between the traditional doctrines of monism, as exemplified in the EU system, on the one hand, and dualism, as it exists within the Irish legal system, on the other. While this undoubtedly forms part of the underlying tension in this area, the position is more complex than these doctrinal labels suggest.

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[216] McDonald, speaking in the context of the Canadian experience, evokes a theme more generally true: "with this long history of dealing with international law, it may seem remarkable that the courts have not yet developed a clear and uncontroverted theory of the relationship between customary international law and municipal law": see McDonald, "The Relationship between International Law and Domestic Law in Canada" in McDonald, Morris and Johnston eds, *Canadian Perspectives on International Law and Organization* (Toronto, 1974), 88, at 96.

[217] Cassese, "Modern Constitutions and International Law" (1985-III) 192 *Recueil des cours* 331, at 368.

[218] Cassese, note 82, at 234.

It will be argued that there is a 'constitutional space' between the international legal system, on the one hand, and internal legal systems, on the other, within which these systems' approach to international law falls to be worked out and the balance struck between respect for international law and freedom to regulate their constitutional affairs and protect other constitutional values. In this constitutional space, internal legal systems enjoy a certain amount of freedom. However, this freedom is not unlimited. Ultimately, in the absence of a clear constitutional rule governing the implementation of a particular international obligation, what is at play is a balancing of constitutional interests, those relating to the respect for international law on the one hand, and those relating to other 'internal' constitutional values on the other. This may present occasional frontal or direct conflicts. More common, however, is the problem of coordinating, harmonising or reconciling these values. In essence, for EU Member States such as Ireland, this constitutional balancing process must now take place within a far broader framework than has traditionally been the case. While there is undoubtedly much common ground between the Irish and EU constitutional frameworks (in that both expressly recognise the importance of international law in principle), there are also significant differences. As a result of the multi-level dimension to this constitutional issue in European Union Member States, its resolution is more complex. On the one hand, there are obviously actual and potential tensions and conflicts which must be resolved in a way that is sensitive to all three systems and their demands. On the other hand, while it is desirable to avoid conflicts, if these exist, they must be dealt with effectively through law or politics or the interaction of both at national or EU or international level or at some combination of all three. Furthermore, there may equally be mutual reinforcement and synergies and, as between the EU and Member States' legal systems, a radiating effect beyond the strict scope of EU law. Moreover, this framework cannot be considered static. Both constitutional systems, and the relationship between them, are marked by a strong degree of dynamism.

The fundamental challenge for internal legal systems remains the same: that is, to respect international law while, at the same time, ensuring respect for domestic constitutional processes and values. As more and more international law requires implementation within internal legal systems, this is a matter of increasing practical and theoretical concern. Because of the far-reaching changes in international law as it relates to internal legal systems, especially in the EU, the explanatory power of doctrines of monism and dualism is much diminished. By re-focusing the question,

and analysing it within the constitutional framework just set out, this study seeks to better understand this problem in the case of the Irish legal system and suggest an improved approach to framing and resolving it. While this may appear self-evident, it has been neglected in the analysis of these issues to date. What is clear, even at this stage, is that, from the perspective of the Irish legal system, this problem can no longer be analysed without having regard to its significant EU dimension. After setting the legal framework governing Ireland's international relations in Chapter 2, this thesis considers these issues by reference to each of the main sources of international law.

CHAPTER 2.

THE LEGAL FRAMEWORK OF IRELAND'S INTERNATIONAL RELATIONS

I. INTRODUCTION

This chapter examines the legal framework governing Ireland's international relations. It looks at the structure within which the State *forms* its international obligations, as opposed to the structure within which it *performs* its international obligations which, insofar as the internal legal system is concerned, is the subject of the core of this thesis, Chapters 3 to 6.[1]

In this Chapter, the focus is on the *internal* legal framework of Ireland's international relations.[2] First and foremost, this framework is to be found in the Irish Constitution, Article 29 of which deals with 'international relations'. However, as the EU's role in international relations has continually expanded, the European Treaties also form an integral part of this framework. The Treaties not only vest competence in the EU in specific fields of international relations. They also establish a general structure for coordination of Member States' foreign policies. Ireland's international relations must therefore be understood in the context of this broader, more complex, and dynamic, legal framework. The aim of this chapter is to set out the broad lines of this legal framework. To this end, it will first examine the legal framework governing international relations under the Constitution of Ireland, 1937. Secondly, it will examine the legal framework governing international relations under the

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[1] I adopt the distinction drawn by Wheare: see Wheare, *Legislatures* (2nd ed., Oxford University Press, 1968), at 115-6. See also *Attorney-General for Canada v. Attorney-General for Ontario (Labour Conventions)* [1937] AC 326 (PC) where Lord Atkin (at 347) noted that it was "essential to keep in mind the distinction between (1.) the formation, and (2.) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States".

[2] Of course, in the first instance, the State's international relations are governed by the rules of international law, which determine the manner in which its rules, be they customary or conventional, bind members of the international community. Although the State enjoys great freedom of action, by virtue of its participation in the international community, it is also bound by certain basic principles of international law, as reflected in customary international law and the general principles of law recognised by the international community. This provides the basic framework within which all members of the international community interact, whether by engaging in diplomatic relations, concluding treaties or participating in international organizations, and thereby determines the extent of their participation within this community. This might be called the *external* legal framework of Ireland's international relations.

European Treaties. By providing a better understanding of how Ireland becomes bound by the rules of international law, the implementation of which will be examined in subsequent chapters, this Chapter seeks to highlight the influence of this changing legal framework on the process of implementation of international law in the Irish legal system.

II. LEGAL FRAMEWORK GOVERNING INTERNATIONAL RELATIONS UNDER THE IRISH CONSTITUTION, 1937

A. The Constitutional Heritage

In order to understand the legal framework governing international relations under the Constitution of Ireland, 1937 (the 1937 Constitution), it is necessary to look briefly at Ireland's constitutional heritage. While the foundation of the Irish Free State following the signing of the "Treaty"[3] in the aftermath of the war of independence marked a radical departure in Ireland's status in the international community, its precise international legal status remained unclear for some time.

Pursuant to the terms of the Treaty, Ireland enjoyed "the same constitutional status in the Community of Nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa...".[4] In the early 1920s, following their active participation in the First World War, the external status of the British Dominions was at an important stage in its evolution.[5] Yet to a great extent the Dominions remained embedded

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[3] Articles of Agreement for a Treaty between Great Britain and Ireland (signed 6 December 1921) 27 LNTS 449. Ireland's "place among the nations" had increasingly become an important theme in nationalism in the 19th and early 20th centuries. Immediately prior to independence, building upon the Proclamation of Independence of 1916, the First Dáil of 1919 established a Minister for Foreign Affairs, issued a Declaration of Independence and Message to the Free Nations of the World, and sought, unsuccessfully, to press the case for self-determination for Ireland at the Peace Conference at Versailles. See Keatinge, *A Place Among the Nations: Issues of Irish Foreign Policy* (Institute of Public Administration, Dublin, 1978), at 9-58 (Part I, 'The Historical Legacy').

[4] This was reflected in Article 1 of the Constitution of the Irish Free State, 1922 (the 1922 Constitution), by which the State was governed until the enactment of the 1937 Constitution. The Agreement also contained a number of provisions of significance in respect of the State's nascent foreign policy, notably in respect of its coastal defence which was to be undertaken by the British navy. Article 6 of the Treaty had provided that the coastal defence of the State would be undertaken by the United Kingdom forces and Article 7 provided for British control of a number of Irish ports.

[5] See Lloyd and James, "The External Representation of the Dominions, 1919-1948: Its Role in the Unravelling of the British Empire" (1996) 67 *BYBIL* 479. See also in respect of Canada, Jacomy-Millette, *Treaty Law in Canada* (Chapter III, "The Acquisition of International Personality by Canada"); in respect of Australia, see O'Connell and Crawford, "The Evolution of Australia's International Personality" in KW Ryan (ed), *International Law in Australia* (2nd ed, Law Book Co, Sydney, 1984), at 1-34.

within the legal framework of the British Empire and later Commonwealth in which the United Kingdom was the central player. By 1923, their capacity to conclude treaties of a political, and not merely technical, character, was recognised.[6]

Like its fellow Dominions, the Irish Free State increasingly engaged in international relations, independently of the United Kingdom.[7] Certain milestones marked the Free State's momentum. The registration of the Treaty at the League of Nations in 1923 was a significant achievement for the fledging State and formed part of a continuum of proactive international practice which helped assert the independent status of, not only the Free State, but of the the British Dominions more generally, on the international stage.[8] This independent stance was further evidenced in the approach of the Free State to accession to the Statute of the Permanent Court of International Justice,[9] and its insistence on being granted a separate official seal, the Great Seal of Ireland, permitting the Government to advise the King directly rather than through the intermediary of the Secretary of State for the Dominions, a member of the United Kingdom Government.[10] Both actions rejected the validity of the *inter se* doctrine to the Free State, according to which the relations between Commonwealth members, which owed their allegiance to a single Crown, were not, properly speaking, "international" relations.[11]

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[6] This change, which followed upon the conclusion, independently of the United Kingdom, of the United States-Canada Halibut Treaty of 1923, was formally recognised at the Imperial Conference of 1923: see Fitzsimons, *Les traités dans la constitution et pratique irlandaises* (Doctoral thesis, University of Paris II, 1987), at 33.

[7] For a detailed account of the Irish Free State's role in this process between 1921 and 1931, see Harkness, *The Restless Dominion* (New York University Press, 1970). For a valuable legal analysis of these developments, see Fitzsimons, note 6, Part I, pp.10-119. Following the establishment of a permanent delegation to the League of Nations in Geneva in 1923, the first Dominion to do so (See Harkness, at 57), the Free State gradually increased its diplomatic network, with appointments to Paris, Berlin and the Holy See in the late 1920s, following those to London in 1923 and Washington in 1924 (See Keogh, *Twentieth-Century Ireland* (Revised ed., Gill & MacMillan, 2005), at 50-52). Ireland's treaty-making also gradually expanded in the period following independence, as the Free State concluded treaties, both of a commercial and political character. This is evidenced in the Irish Treaty Series and also in the system of international registration, which first developed around the time of independence (in particular, in the form of the League of Nations, and subsequently the United Nations, Treaty Series). According to the Department of Foreign Affairs, "it has been the practice of the Minister for Foreign Affairs since 1930, with certain exceptions, to publish the international agreements to which the State becomes a party in the Irish Treaty Series".

[8] See generally Harkness, note 7, and Kennedy, *Ireland and the League of Nations 1919-1946* (Irish Academic Press, 1996).

[9] Kennedy, note 8, at 118-121.

[10] Stewart, "Treaty-Making Procedure in the British Dominions" (1938) 32 *AJIL* 467, at 481-2.

[11] See Fitzsimons, note 6, at 50-52. Similarly, at the London Naval Conference of 1930, the Free State and South Africa asserted their independence and equal status as members of the British Commonwealth: Stewart, note 10, at 485. Politically, this approach was also evident in de Valera's opening address to the Assembly as president of the Council of the League of Nations in September 1933: See Keogh, note 7, at 78-9.

The 1922 Constitution contained no express reference to the State's capacity to conduct international relations. Although the executive power was vested in the King, and the Governor-General acting on his behalf,[12] this power was, in practice, exercised by the Executive Council which was responsible to Dáil Eireann.[13] The Executive Council included a Minister for External Affairs.[14] As Morgan has observed, the King "occupied a lofty, though symbolic, position as head of state in the Irish Constitution".[15] However, because of his position as head of state, the King's role remained of importance in the conduct of the Free State's international relations.

In the final amendment of the 1922 Constitution which took effect shortly before the enactment of the 1937 Constitution, the Constitution (Amendment No. 27) Act, 1936 removed all references to the Governor-General and to the King.[16] The

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[12] Article 51 of the Constitution dealt with the executive authority of the State, which was vested in the King and "exercisable in accordance with the law, practice and constitutional usage governing the exercise of the Executive Authority in the case of the Dominion of Canada, by the Representative of the Crown". It provided for "a Council to aid and advise in the government of the Irish Free State... to be styled the Executive Council" which was "responsible to Dáil Eireann and shall consist of not more than seven nor less than five Ministers appointed by the Representative of the Crown on the nomination of the President of the Executive Council". Article 60 provided for the appointment of the Representative of the Crown "who shall be styled the Governor-General of the Irish Free State".

[13] The foreign policy of the Free State also had implications for Dáil Eireann. According to Stewart, while parliamentary approval was not legally necessary for the ratification of any treaty, because it had no function as such in treaty-making, the practice of the Free State was that all treaties, except those of a technical or administrative character such as postal agreements, were laid on the table of the Parliament. Furthermore, "political treaties", treaties requiring appropriations of money, and treaties requiring a change of the law, "were usually brought before Parliament for its approval": See Stewart, note 10, at 482-3.

[14] The Department of External Affairs was formally established under the Ministers and Secretaries Act, 1924. Section 1(xi) provided: "The Department of External Affairs which shall comprise the administration and business generally of public services in connection with communications and transactions between the Government of Saorstát Eireann and the Government of any other state or nation, diplomatic and consular representation of Saorstát Eireann in any country or place, international amenities, the granting of passports and of visés to passports, and all powers, duties and functions connected with the same, and of which Department the head shall be, and shall be styled, an t-Aire Gnóthaí Coigríche or (in English) the Minister for External Affairs". In his study of the Constitution of the Irish Free State, Kohn offered a useful summary of the role of that Department during the Free State era. It was "the normal channel of communication between the Executive Council and the Governments of Great Britain and the Dominions" as well as being charged with "the maintenance of diplomatic relations with foreign States, including all matters connected with passports, visas, commercial and financial relations, trade treaties, deportation, extradition and repatriation", "the appointment and instruction of Irish diplomatic and consular representatives abroad" and "the relations of the Free State with the League of Nations", within which sphere Kohn described the "active foreign policy of the Free State" as pre-eminently lying. See Kohn, *The Constitution of the Irish Free State* (Allen & Unwin, 1932), at 318-319.

[15] Morgan, *Constitutional Law of Ireland* (2nd ed., Gill & MacMillan, 1990), at 23.

[16] Following the amendment, Article 51 provided:
Provided that it shall be lawful for the Executive Council, to the extent and subject to any conditions which may be determined by law to avail, for the purposes of the appointment of diplomatic and consular agents and the conclusion of international agreements of any organ used as a constitutional organ for the like purposes by any of the nations referred to in Article 1 of the Constitution, there shall be a Council to exercise the executive authority and power in the government of the Irish Free State (Saorstát Eireann) to be styled the Executive Council.

following day, the Dáil passed the Executive Authority (External Relations) Act, 1936, which, as well as making formal provision for the abdication of Edward VIII, provided, in section 1, for the appointment of the State's diplomatic and consular representatives and, in section 2, for the conclusion by the State of international agreements "by or on the authority of the Executive Council". Section 3 provided that, so long as the State remained associated with the other members of the Commonwealth and so long as the King continued to act on their behalf for the purposes of conclusion of international agreements and diplomatic and consular appointments, "the king so recognised may, and is hereby authorised to, act on behalf of Saorstát Eireann for the like purposes as and when advised by the Executive Council so to do". Thus, the position of the King lost its express constitutional status and was placed on a mere statutory footing, an Irish statutory footing which, in light of the Statute of Westminister, 1931, could be amended or repealed by the Dáil at any time.[17]

The 1937 Constitution would contain no reference to the King's role or to the Commonwealth save by oblique allusion in Article 29.4.2.[18] This provided the basis for the carry-over of the 1936 Act, which continued in force until 1949, when, following the declaration by the then Taoiseach that Ireland would leave the Commonwealth, the Act was finally repealed by the Republic of Ireland Act, 1948, and with it any reference to, and any role for, the King in Ireland's international relations finally removed.[19] So it was that, even following the approval and

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[17] Casey identifies the implications of this legislation: "...the king was no longer part of the Constitution for internal purposes and there was no Governor-General ... the king had a purely formal role in foreign relations but since this rested only on statute, changing it would not involve a constitutional amendment....thus by the end of 1936 Mr. de Valera had achieved "external association" and the stage was properly set for the introduction of a new constitution".Casey, *Constitutional Law in Ireland* (3rd ed., Round Hall, 2000), at 19. Although legislation along the lines of the 1936 Act, giving effect to De Valera's longstanding idea of an 'external association', formed part of De Valera's project for constitutional reform, "the abdication crisis", as Keogh and McCarthy observe, "compelled de Valera to rearrange his preferred timetable for constitutional change": See Keogh and McCarthy, *The Making of the Irish Constitution* (Mercier Press, 2008), at 92.

[18] See Kelly, Preface to the First Edition, republished in Hogan and Whyte (eds), *J.M. Kelly: the Irish Constitution* (LexisNexis Butterworths, 2004): "When the new Constitution came into force, membership [of the Commonwealth] became informal, the only surviving institutional link with Britain being the Executive Authority (External Relations) Act which referred vaguely to Saorstat Eireann's 'association' with other nations....". See also Stewart, note 10, at 481. After referring to Article 49 of the 1937 Constitution, he states: "By this provision the power of treaty-making, formerly belonging to the King as the unquestioned prerogative of sovereignty, is apparently taken from the King and vested in the people, to be exercised in respect of Ireland by His Majesty on the authority of the Irish Government.. the function of the Crown is now to act merely as agent for Ireland in treaty-making".

[19] For a comprehensive account of this, see McCabe, *A Diplomatic History of Ireland, 1948-1949: The Republic, The Commonwealth and NATO* (Irish Academic Press, 1991). See also the discussion by Fitzgerald, "The Irish Constitution in its Historical Context" in Murphy and Twomey eds, *Ireland's Evolving Constitution, 1937-1997* (Hart Publishing, 1998) and Chubb, *The Constitution and*

enactment of the 1937 Constitution, the framework of the State's international relations continued to operate, for over a decade, in the shadow of the State's constitutional heritage and the British Commonwealth. Nevertheless, it is the relevant provisions of the 1937 Constitution, to which we now turn, that are of primary importance in regulating Ireland's international relations.

B. International Relations in the 1937 Constitution

By referendum dated 1st July 1937, the Irish people voted in favour of the enactment of Bunreacht na hEireann, the Constitution of Ireland (the 1937 Constitution), which came into force on 29th December 1937. While the directly-elected office of President of Ireland replaced the King as Head of State, the effect of the Executive Authority (External Relations) Act, 1936 was that the King continued to serve such a role in the State's external relations until its ultimate repeal in 1949. However, the institutional structures of government remained broadly similar to those of the 1922 Constitution. Notwithstanding the comment of de Valera that the State's international relations were put "in their proper place....outside the Constitution",[20] the 1937 Constitution, in common with other European constitutions of the inter-war era, departed from its predecessor in making express provision for the State's international relations.

In Article 1 of the Constitution, the Irish nation affirmed "its inalienable, indefeasible and sovereign right to chose its own form of Government, to determine its relations with other nations, and to develop its life, political, economic and

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Constitutional Change in Ireland (Institute of Public Administration, 1978), Chapter 3. Morgan, note 15, who notes (at 23-4): "In spite of all these developments, including the 1937 Constitution, the United Kingdom did not protest that there had been any breach of the Treaty and continued to regard Ireland as a member of the Commonwealth until 1949, when the Republic of Ireland Act came into effect. The Irish view was that Ireland had left the Commonwealth in 1937 and for the next twelve years was only externally associated with it, for the limited purposes contemplated by the Executive Authority (External Relations) Act, 1936".

[20] See the statement of Eamon de Valera during the course of the debates over the proposed Constitution at 67 Dáil Debates 60 (11th May 1937): "The next portion of importance in the Constitution is that which deals with the question of international relations. With regard to international relations generally, it does not make a change. It is not intended to make a change, except this change, that it puts the question of our international relations in their proper place—and that is outside the Constitution. .... The idea of this Constitution is to put this matter of our external relations in its proper position relatively to the Constitution, and that is outside it, as a matter of foreign policy, to be determined from time to time, according as the people's interests suggest to them that they should put this Government or that Government into office with powers to implement their will. ....when this Constitution is passed, as far as our external relations are concerned, no change is made, but the external relations are kept in a position in which they can be dealt with and handled as a matter of public policy, without bringing them across the fundamental rights which govern the working of our institutions."

cultural, in accordance with its own genius and traditions". It was thus a clear assertion not alone of sovereignty in its internal affairs but also in its international relations. This was reiterated in Article 5 which described Ireland as "a sovereign, independent, democratic state". Article 6 elaborated on this by providing that "all powers of government, legislative, executive and judical, derive, under God, from the people whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good". While stopping short of formally declaring a republic, the Constitution established such a political structure in all but name, the so-called 'dictionary republic',[21] and provided the basis for the eventual declaration of the Republic of Ireland in 1949.[22]

As well as these general provisions, the Constitution also dealt explicitly with aspects of the State's international relations. Thus, Article 28.3 dealt with the declaration of, and participation in, war as well as the Government's powers "in case of actual invasion". More broadly, Article 29, entitled 'International Relations', set out the constitutional vision and framework in this sphere in some detail. Specific sections of this Article, which will be examined in detail below, deal with the constitutional assignment of functions in international relations and the place of international law within the Irish legal system. For present purposes, it suffices to recite those which shed light on the general constitutional vision of international relations. In section 1 of Article 29, "Ireland affirms its devotion to the ideal of peace and friendly cooperation amongst nations founded on international justice and morality" while, in section 2, "Ireland affirms its adherence to the principle of the pacific settlement of international disputes by international arbitration or judicial determination". Both provisions clearly envisage an international community committed to peace and the rule of international law. This vision is further enshrined

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[21] The phrase refers to de Valera's famous statement to the Dáil, which can be found at 97 Dáil Debates 2569 (17 July, 1945). After setting the key provisions of the Constitution, de Valera stated, "The State whose institutions correspond to these Articles is, it seems to me, demonstrably a republic. Let us look up any standard text on political theory, look up any standard book of reference and get from any of them any definition of a republic or any description of what a republic is and judge whether our State does not possess every characteristic mark by which a republic can be distinguished or recognised. We are a democracy with the ultimate sovereign power resting with the people—a representative democracy with the various organs of State functioning under a written Constitution, with the executive authority controlled by Parliament, with an independent judiciary functioning under the Constitution and the law, and with a Head of State directly elected by the people for a definite term of office." The term was also used against de Valera by his opponents: see the comments of de Valera at the time of the passing of the Republic of Ireland Act, 1948 at 113 Dáil Debates 840.

[22] Section 2 of The Republic of Ireland Act, 1948: "It is hereby declared that the description of the State shall be the Republic of Ireland." The Act came into force on 18th April, 1949: see S.I. No. 27/1949 (The Republic of Ireland Act, 1948 (Commencement) Order, 1949).

in Article 29.3, according to which Ireland "accepts the generally recognised principles of international law as its rule of conduct in its relations with other States".

C. The Executive Power in External Relations[23]

In line with most constitutional systems,[24] and following the Westminster model inherited from the 1922 Constitution, primary place in Ireland's international relations is given to the Government, the executive branch. Article 29.4 provides:

> 1° The executive power of the State in or in connection with its external relations shall in accordance with Article 28 of this Constitution be exercised by or on the authority of the Government.[25]

In *Crotty v. An Taoiseach*, Walsh J. enumerated the principal elements of executive power in this area:

> These powers of the State include the power to declare war or to participate in a war, to conclude peace, to make treaties, and maintain diplomatic relations with other states.[26]

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[23] It will be noted that, while Article 29 is entitled 'international relations', Article 29.4.1 speaks of 'external relations'. In 1971, the Department of External Affairs was re-titled the Department of Foreign Affairs. See S.I. No. 158/1971, External Affairs (Alteration of Name of Department and Title of Minister) Order, 1971, which took effect from 3rd March 1971. The then Minister, Dr. Hillery, explained that "[the] change is being made as "Foreign Affairs" is now the more usual and more appropriate term; the term "External Affairs" is of British Commonwealth origin": 251 Dáil Debates 248 (28th January 1971). The change took place against the background of similar changes in Commonwealth members such as Australia: see 249 Dáil Debates 2074 (25 November, 1970). Although there are undoubtedly nuances in the meaning of these terms (the scope of 'international relations' arguably being broader than that of 'external relations' or 'foreign affairs'), it is suggested that they are also largely co-extensive and often used interchangeably.

[24] The vesting of competence in foreign affairs in the executive branch of government is common across constitutional systems. The rationale for so doing was well-articulated in the Department of Foreign Affairs' White Paper on Foreign Policy of 1996, which stated (at para.16.36):

> ....Ireland follows the normal pattern in parliamentary democracies of according responsibility for the day-to-day operation of foreign policy to the Government. Such practice is predicated on the unpredictability of external events, the need for a credible external interface capable of representing the State in international negotiations, and the need to be able to act swiftly in matters of security.

See Department of Foreign Affairs, *Challenges and Opportunities Abroad: White Paper on Foreign Policy* (Stationery Office, 1996) (hereinafter the White Paper), at 337.

[25] Article 28.2 states: "The executive power of the State shall, subject to the provisions of this Constitution, be exercised by or on the authority of the Government". With respect to subsection 1, the executive power may be exercised by different members of the Government or may be delegated e.g. to the President. See http://www.dfa.ie/home/index.aspx?id=351 (Home / Policies / International Law / Irish Treaty Practice)(last accessed 26 October 2010). The executive power is not defined in the Constitution. As Casey rightly points out, "it has been suggested that so indefinite is the notion of executive power that it amounts to what is left when the legislative and judicial powers are subtracted": Casey, note 17, at 231. Indeed, Article 29.4.1° is one of the few express references to the content of this power of government.

[26] *Crotty v. An Taoiseach* [1987] IR 713, at 778.

While much has changed in the practice of international relations and the context within which they take place, with the role of international organisations now of central importance, these powers – to maintain diplomatic relations, to make treaties (and through them, to establish international organizations), to make war and peace – continue to form the core of States' external or international relations.

The effect of Article 29.4.1° is to give the Government the exclusive power to represent the State on the international stage and to determine the State's foreign policy.[27] In *Boland*, Budd J. emphasised that "it is for the Executive to formulate matters of policy".[28] As Walsh J. stated in *Crotty*:

> The Government alone has the power to speak or to listen as a representative of the State in its external relations. It is the Government alone which negotiates and makes treaties and it is the sole organ of the State in the field of international affairs. For these functions it does not require as a basis for their exercise an Act of the Oireachtas.[29]

While, as Kelly noted, "subsection 1...might seem redundant if it stood alone", "its presence is intended to assert emphatically the status of the Government as controlling external relations despite the contemporary situation in 1937, created by

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[27] In view of its importance, the executive power in external relations is in certain cases exercised at the highest level. The President, as Head of State, now plays an increasingly active role in the representation of the State in this sphere: see the White Paper, note 24, at 330. Section 3 of the Republic of Ireland Act, 1948 provides that "The President, on the authority and on the advice of the Government, may exercise the executive power or any executive function of the State in or in connection with its external relations". So too the Taoiseach, as Head of Government, often plays an important role in particular areas of foreign affairs: see the White Paper, note 24, at 336. In practice, the executive power in external relations is primarily exercised by the Minister for Foreign Affairs, who heads the Department of Foreign Affairs and is assisted by two Ministers of State, with special responsibility for European Affairs and for Overseas Development respectively. In respect of treaty-making, it is generally the Minister for Foreign Affairs who exercises the authority to conclude international agreements on behalf of the Irish Government. See http://www.dfa.ie/home/index.aspx?id=351 (last accessed 26 October 2010) (noting that this is so except in the cases of International Labour Organization conventions and the European Treaties). However, as their subject-matter has extended into areas traditionally regulated on the domestic plane, such agreements will often be concerned with areas of policy falling within the remit of other members of the Government in which case the relevant Minister undertakes negotiations in liaison with the Minister for Foreign Affairs. The Minister, and his representatives, represent the State at international conferences and within international organizations.

[28] *Boland v. An Taoiseach* [1974] IR 338, at 366.

[29] [1987] IR 713, at 777-778. See also the comments of Kearns J. in *Horgan v. Ireland* [2003] 2 IR 468, at 510: "These Articles demonstrate that the Government, and the Government alone, can exercise the executive power of government. Its freedom and discretion is limited only by those exceptions as provided for in the Constitution." Connelly, discussing the combined effect of Article 28.2 and 29.4.1, also stresses that the provisions mean "that the competence of the Government to conduct Ireland's foreign relations ... is constitutionally based": See Report of the Constitution Review Group (Stationery Office, 1996), Chapter 15, 563 *et seq*. There are of course many statutory powers also vested in the Minister for Foreign Affairs in addition to certain common law powers: see http://www.dfa.ie/home/index.aspx?id=3034 (last accessed 26 October 2010) for a comprehensive list.

the Executive Authority (External Relations) Act 1936, which featured the British Crown still discharging a vestigial function in this area".[30]

Article 29.4.2° permits the Government, "for the purpose of the exercise of any executive function of the State in or in connection with its external relations", to such extent and subject to such conditions, if any, as may be determined by law, to "avail of or adopt any organ, instrument, or method of procedure used or adopted for the like purpose by the members of any group or league of nations with which the State is or becomes associated for the purpose of international co-operation in matters of common concern". Insofar as the Executive Authority (External Relations) Act, 1936 continued to provide for the use of the British Crown for certain functions in external relations, as discussed above, this section "provided a constitutional basis for what otherwise would have been a derogation from the unfettered sovereignty of the State in the matter of external relations".[31] While this was undoubtedly the primary purpose of Article 29.4.2°,[32] which was therefore "rendered largely redundant"[33] following the coming into force of the Republic of Ireland Act, 1948, the provision is worded in more general terms, applying to "*any* organ, instrument or method of procedure" used by members of "*any* group or league of nations".[34] The intentionally broad scope of the provision must be seen in the light of the very important role of the League of Nations in Irish foreign policy during the 1920s and 1930s, and the active role played by Irish representatives, including de Valera, at the League.[35] Although the League demised with World War II, the possibility of the use of Article 29.4.2° beyond the confines of the British

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[30] See Kelly, *The Irish Constitution* (3rd edn, Butterworths, 1994), at 277, as quoted by the Constitution Review Group, *Report of the Constitution Review Group*, at 108.

[31] Constitution Review Group, note 30, at 109.

[32] See the statement of Eamon de Valera at 67 Dáil Debates 60 (11th May 1937): "Although it is giving a power which has been clearly and obviously suggested by the exact circumstances in which we find ourselves at the moment, nevertheless if we were a completely isolated State in the world, looking around us, and if we thought there was going to be instituted a league which was going to hold itself together by an agreement amongst its members to operate in a certain way, we should have power, if we wanted to, to join such a league. I am not saying that that idea—although I think it is a perfect one in the Constitution, and ought to be there —would have been suggested to me or anybody else except in the context of the existing situation, but there is nothing in it that is derogatory to the powers of the people, of the people's Parliament, of the Government, to do that. Consequently, dealing with our external relations, it enables the Executive Government of the day to make use of it, provided that there is a law passed by the national Parliament which would make that possible. Now, the law can exactly prescribe the conditions. In our case the law has already been passed, and this Constitution takes over that law."

[33] Constitution Review Group, note 30, at 109.

[34] Emphasis added.

[35] There were two pieces of legislation on the Statute book relating to League membership: League of Nations (Guarantee) Act, 1923; League of Nations (Obligations of Membership) Act, 1935.

Commonwealth was recognised by Walsh J. in *Crotty*[36] albeit subject to some "very clear limitations".[37] Moreover, while the provision envisages "the possibility of being associated with groups of nations for the purpose of international co-operation in matters of common concern" and providing for "the possibility of the adoption of a common organ or instrument", it refrains "from granting to the Government the power to bind the State by agreement with such groups of nations as to the manner or under what conditions that executive function of the State would be exercised".[38] Thus, the Supreme Court held that Article 29.4.2°could not provide constitutional cover in that case for Title III of the Single European Act which formalised the practice of European Political Co-operation. Special provision has therefore had to be made within Article 29 for the State's membership of the European Union, as it has developed, since Article 29.4 was first amended on Ireland's accession in 1973.

In summary, the Government is the primary actor in the State's external relations, formulating Irish foreign policy, representing the State, and negotiating and concluding international agreements on its behalf. Yet the executive power in external relations is not unlimited. As with the other powers of government under the 1937 Constitution, it is subject to certain controls, checks and balances. The executive power is, in accordance with Article 28.2, and as recognised and enforced by the Supreme Court in *Crotty*, exercised by or on the authority of the Government "subject to the provisions of this Constitution". [39] This overarching limitation - that the executive power in external relations must be exercised subject to the Constitution - encompasses both express restrictions to be found in the constitutional text as well as implied restrictions which the Courts have recognised as inherent in the constitutional scheme.[40] Moreover, as the *Crotty* case so clearly demonstrated,[41]

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[36] "The history of this particular provision is too well known to require elaboration but the wording is such that for the particular purpose of that provision the European Economic Community is in my view such a group or league of nations with which the State is associated for the purpose of international co-operation in matters of common concern.": *Crotty v. An Taoiseach* [1987] IR 713, at 783.

[37] Walsh J. set out the following "very clear" limitations on this provision: first, it relates "solely to the exercise of the executive functions of this State in its external relations and is subject to such conditions, if any, as may be determined by law"; secondly, "it simply provides for the adoption of any organ or instrument or method of procedure for the exercise of the executive functions of the State" and "does not require prior consultation with any other State as to the policy itself"; thirdly, it "provides that there must be enabling legislation": *Crotty v. An Taoiseach* [1987] IR 713, at 783.

[38] [1987] IR 713, at 783.

[39] [1987] IR 713, at 773. As Connelly has stated, the Constitution "does not give a completely free hand to the Government in this field" and "places limitations on what the Government may do, including the extent to which the Government may bind the State internationally": See Connelly, "The Government and the conduct of foreign affairs" in Constitution Review Group, note 30, Annex 15.

[40] For a useful discussion and enumeration of the limitations on the Government, see Connelly, note 30, in Constitution Review Group, note 30, Annex 15.

the Government may be held to account before the courts where it does not respect these restrictions. Accordingly, the following sections offer a brief analysis of the express and implied restrictions which the Constitution imposes on the executive power in external relations.

D. The Role of the Oireachtas

The Oireachtas[42] is vested with a number of powers which confer upon it a supervisory role in international relations and which place limits on the Government's freedom of action in that field.[43] These provisions combine to establish the scheme identified by Finlay C.J. in *Crotty*.[44] If this scheme would appear to represent a substantial limitation on the executive power in external relations, its implications, in practice, are confined by the reality of a parliamentary system, in which the Government is chosen from, and forms part of, Dáil Eireann and, to a great extent, controls the conduct of business in both Houses of the Oireachtas. Nevertheless, it is important to examine the different parliamentary powers in order to understand fully the legal framework of Ireland's international relations.

The first set of powers give the Oireachtas, which has no role in the negotiation and conclusion of international agreements, an important role in the control of these powers.[45]

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[41] See infra Section II.F.

[42] In accordance with Article 15.1.2°, the Oireachtas or National Parliament consists of "the President and two Houses, viz.: a House of Representatives to be called Dáil Éireann and a Senate to be called Seanad Éireann".

[43] During the consultations in respect of the draft Constitution, the Secretary-General of the Department of Finance queried whether the provisions of Article 29 (then Article 25) "might not cramp the style of the Department [of External Affairs] in the matter of negotiation of international agreements". He further commented that "the State subscribes to quite a number of international institutions and organisations under agreements, the terms of which are never laid out before and formally approved by Dáil Eireann".See Keogh and McCarthy, note 17, at 135.

[44] After setting out the provisions of Article 29.5 and 29.6, Finlay C.J. made the following statement ([1987] IR 713, at 774-5): "From these constitutional provisions, it seems reasonable to infer a scheme under the Constitution that by virtue of Article 29, s. 5, sub-s. 1, Dáil Éireann should have a primary control over the exercise by the Government of its executive power in relation to entering into international agreements, and that under Article 29, s. 5, sub-s. 2 no international agreement of major importance being one that involved a charge upon public funds could bind the State without the approval of Dáil Éireann as to its terms. This scheme is consistent with the provisions of Article 28, s. 3, sub-s. 1 ... A declaration of war and participation in war is necessarily part and parcel of the external relations of the State. This provision again emphasises the control by Dáil Éireann of the Government in its exercise of executive power in external relations."

[45] As Stewart remarked in 1938, "the 1937 Constitution attempts, in the main, to preserve [the previous] procedure by embedding it in the fundamental law": Stewart, note 10, at 483.

First, Article 29.5.1° provides that "every international agreement to which the State becomes a party shall be laid before Dáil Éireann".[46] No time limit is laid down for such laying of agreements.[47] It is interesting to note that, while much of the United Kingdom institutional structure and practice in this area was carried over in the Free State, the 1922 Constitution pre-dated the coming into being of the so-called Ponsonby Rule whereby treaties signed subject to ratification would be placed before the Houses of Parliament for 21 days prior to ratification.[48] No such convention found its way into Free State constitutional practice or the provisions of the 1937 Constitution. Although the Rule is operated subject to a number of limits,[49] it nonetheless provides an important opportunity for parliamentary scrutiny of the State's treaty obligations *in advance of* the State's consenting to be bound by those obligations, which makes the exercise of this scrutiny more meaningful.[50]

The requirement of subsection 2 of Article 29.5 is qualified by subsection 3,[51] which provides that "this section shall not apply to agreements or conventions of a technical and adminstrative character".[52] While it can sometimes be difficult to distinguish those agreements or conventions which are "technical and

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[46] As Stewart commented, this phrase "is apparently intended to include agreements between governments as well as heads-of-state treaties", noting that the Government of Ireland did not recognise any distinction between such categories of agreement: Stewart, note 10, at 483. He also notes, at 484, that it was "a policy of the Irish Government to avoid the use of the King in treaty-making wherever possible", which was effected by concluding intergovernmental treaties where possible and even by acceding to a treaty at a later stage so as to avoid the necessity to use the King.

[47] As Casey notes, such agreements are binding "without either advance or subsequent Dáil approval": Casey, note 17, at 231. However, in recent times, efforts have been made to do so within a year of the State giving its consent to be bound. See 613 Dáil Debates 1443 (31 January, 2006). Where this has been default in complying with this requirement, the remedy is readily available by laying an agreement before the Dáil.

[48] See the information note available on the Foreign and Commonwealth Office website: http://www.fco.gov.uk/resources/en/pdf/pdf4/fco_pdf_ponsonbyrule (last accessed 26 October 2010)

[49] See Harrington, "Scrutiny and Approval: The Role for Westminster-Style Parliaments in Treaty-Making" (2006) 55 *ICLQ* 121, at 127-130.

[50] See now section 20 of the Constitutional Reform and Governance Act 2010 which places the Ponsonby Rule on a statutory footing.

[51] The structure of Article 29.5 is such that its third subsection dealing with "technical and administrative" agreements qualifies both its first and second subsections: those requiring all other international agreements (i.e. not of an administrative and technical character) to be laid before the Dáil and approval of all agreements involving a charge upon public funds. So the Supreme Court interpreted the provision in the *State (Gilliland) v. Governor of Mountjoy Prison* [1987] IR 201.

[52] This provision is a reflection of the practical realities of the wide-ranging treaty-making in which a State such as Ireland engages: many international agreements will be concerned with relatively minor, day-to-day transactions between States in respect of which the Government benefits from a higher degree of freedom of action. Casey (note 17, at 232) suggests that the provision may be intended to capture agreements within bodies such as the Universal Postal Union or International Telecommunications Union, agreements, it may be remarked, which were of a technical character enabling them to be concluded by Dominions prior to their emergence to a fuller international status. See e.g. Stewart, *Treaty Relations of the British Commonwealth of Nations* (Macmillan, 1939) and Stewart, "Treaty-making Procedure in the British Dominions" (1938) 32 *AJIL* 480.

administrative" in character from those which are not,[53] the Minister for Foreign Affairs has announced that *all* international agreements will be laid before the Dáil, including those of a technical and administrative nature.[54] For so long as that continues to be the practice, therefore, the practical import of this subsection is limited.

Secondly, subsection 2 of Article 29.5 provides that the "State shall not be bound by any international agreement involving a charge upon public funds unless the terms of the agreement shall have been approved by Dáil Éireann". In line with the general role of the legislative organ in the apportionment of public funds, this provision gives an important power to the Dáil in supervising such treaty-making. In order for the Government to give the State's consent to be bound by such an agreement, the Dáil must have approved its terms. In the absence of such approval, the treaty and any domestic measure purporting to give thereto will be invalid as a matter of Irish law. As the Supreme Court clarified the meaning of Article 29.5.2° in the *Gilliland* case, "a charge upon public funds" is not concerned with every expense a treaty may place on public funds, no matter how incidental, inadvertent or inconsequential; rather, it is designed to ensure parliamentary approval of those direct expenses and costs which not infrequently and often expressly arise in

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[53] While, for example, in *Gilliland* ([1987] IR 201, at 212) the State acknowledged that an Extradition Treaty between Ireland and the United States was not of a "technical and administrative character", more recently, there was some controversy over two security-related agreements with the United States. In response to an inquiry by a member of the Dáil in relation to two agreements with the United States, the Minister for Foreign Affairs laid the agreements before the Dáil: agreements on Security Measures for the Protection of Classified Military Information and on Acquisition and Cross-Servicing - which were both, according to the Minister, standard in nature and relating to Irish defence forces' service in Kosovo: 613 Dáil Debates 1443 (31 January, 2006). Sometimes, international agreements, which may well be of a "technical and administrative" nature, so as to exempt them *prima facie* from the requirements of Article 29.5.3°, may also relate to issues of political sensitivity and benefit from the transparency and opportunity for scrutiny afforded to them by being laid before Dáil Eireann. In its report, the Constitution Review Group considered "whether [the provision] should be changed so as to require the Government to lay before Dáil Eireann all international agreements before they enter into force". Ultimately the Group recommended no change. In favour of such a change, the Group cited possible benefits such as a greater awareness of foreign policy and greater accountability of the Government; going against such a change were practical matters - such as the possible pointlessness of such a procedure and the time pressure it might impose – as well as more principled objections such as the shift this might bring about in the balance of governmental powers in foreign affairs. See Constitution Review Group, note 30, at 116-117. However, upon the Report's consideration by the All-Party Committee on the Constitution, it suggested, in its First Progress Report, that the section should in fact be deleted. See All-Party Committee on the Constitution, *Eighth Report – Government* (Stationery Office, 2003), at 35. See also Law Reform Commission, *Report on the Hague Convention abolishing the requirement of legalisation for Foreign Public Documents* (LRC 48-1995), at 88. For an interesting comparative perspective on these issues, see Symmons, "The Relationship of International Law and Domestic Law in South Africa and Ireland: A Comparative Analysis", in Binchy and Sarkin (eds), *Human rights, the citizen and the state: South African and Irish approaches* (Round Hall, 2001), at 63-86.

[54] 596 Dáil Debates 320 (26 January, 2005); 613 Dáil Debates 1443 (31 January, 2006). Such agreements are also to be published in the Irish Treaty Series.

international agreements, thereby necessitating such a "charge upon public funds".[55] Whether or not this charge is explicitly stipulated,[56] the focus is on the terms of the agreement itself. Moreover, while the effect of default in seeking approval is that the agreement, as a matter of Irish constitutional law, is not binding on the State, and therefore has the potential to cause the Government serious embarrassment and difficulty with its treaty partners, the remedy for the default is to be found in a Dáil motion seeking approval of its terms, on foot of which the Government can validly effect its consent to be bound.[57]

Thirdly, Article 29.6 provides that "no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas". Thus, where the Government negotiates and concludes an international agreement requiring implementation in, or alteration of, Irish law, it is necessary for the Oireachtas to take appropriate action.[58] The practice under Article 29.6 will be examined in detail in Chapter 3.

While these provisions combine to confer important supervisory powers to the Oireachtas in respect of the Government's treaty-making, it must be recognised that the role of the Oireachtas is in practice largely passive. In many respects, because of the nature of the Irish parliamentary system, the control is more apparent than real. By the time the Dáil is called upon to approve the terms of an agreement involving a charge upon public funds, or to enact legislation implementing an international agreement, the terms of the agreement will have already been agreed upon and signed by the parties. In the normal course, by virtue of the fact that the Government is drawn from the Dáil and generally enjoys the support thereof, approval of the terms of an agreement is no more than a formality. While motions of

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[55] *Gilliland v. Governor of Mountjoy Prison* [1987] IR 201.

[56] Thus, in *Crotty*, for example, Walsh J. referred to the fact that Article 29.5.2 had been complied with and commented that "it will obviously involve a charge upon public funds": [1987] IR 713, at 780.

[57] This happened following the decision of the Supreme Court in *State (Gilliland) v. Governor of Mountjoy Prison* [1987] IR 201: 370 Dáil Debates 360 (25 November 1986).

[58] The official practice of the Department of Foreign Affairs is that "the State must be in a position to meet the obligations it assumes under the terms of an international agreement from the moment it enters into force" (See http://www.dfa.ie/home/index.aspx?id=351 (Home / Policies / International Law / Irish Treaty Practice)(last accessed 26 October 2010).). Thus, in practice, the State will sign such treaties subject to ratification; it gives its consent to be bound by the terms only after approval has been obtained (in the case of agreements involving charges upon public funds) or after any necessary legislation has been enacted (in the case of agreements necessitating such action). Although this process arguably leads to significant stagnation in the State's participation in and implementation of certain types of international agreement, this approach is important in principle as it helps to ensure compatibility, or at least minimises the risk of incompatibility, with Irish law of the obligations undertaken in international agreements prior to such obligations becoming binding on the State as a matter of international law.

approval of international agreements occasionally give rise to debate, they most often take place without any debate at all.

The second set of powers vested in the Oireachtas relate to perhaps the most sensitive area of international relations. Article 28.3.1 provides that "war shall not be declared and the State shall not participate in any war save with the assent of Dáil Eireann". Article 28.3.2° states that "[i]n the case of actual invasion, however, the Government may take whatever steps they may consider necessary for the protection of the State, and Dáil Éireann if not sitting shall be summoned to meet at the earliest practicable date".[59] Finally, subsection 3 confers immunity on "any law enacted by the Oireachtas which is expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion, or to nullify any act done or purporting to be done in time of war or armed rebellion in pursuance of any such law". Although the latter subsection was invoked on 2nd September 1939, when the Dáil and Seanad passed resolutions and enacted the Emergency Powers Act, 1939 "for securing the public safety and the preservation of the State in time of war" and was later used in the context of the conflict relating to Northern Ireland,[60] there has never been a declaration of war or participation in war requiring the assent of Dáil Eireann. This is in part explained by the longstanding policy of military neutrality but also by the radical change in the nature of modern armed conflict. In a number of recent cases, the primary decision-making role of the political organs of government in this area has been strongly affirmed.[61] Of more practical importance than this constitutionally-assigned role is that of the Oireachtas in approving the participation of the Irish Defence Forces in United Nations peacekeeping missions and, more recently, as part of the so-called "triple-lock" mechanism, in approving

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[59] These provisions were the successors to Article 49 of the Constitution of the Irish Free State, 1922.

[60] See Hogan and Whyte, note 18, at 442-3. As Casey notes, it "would be difficult to overemphasise the plenitude of power thus vested in the Oireachtas": Casey, note 17, at 181.

[61] However, the provisions have been unsuccessfully invoked in a number of recent cases concerning the use by US military aircraft as a stop-over en route to Iraq and Afghanistan respectively: see *Horgan v. Ireland* [2003] 2 IR 468; *Dubsky v. Ireland* [2007] 1 IR 63. In the *Horgan* case, the Dáil had passed a resolution, setting out its position in relation to the conflict and expressly stating that it would not participate therein. While both sides conceded that the plaintiff had raised a justiciable issue (relying on a *dictum* of Griffin J. in the *Crotty* case), they also agreed that the exercise of the jurisdiction of the Court "must be subject to restraint of an unusual degree": [2003] 2 IR 468, at 514. In order to intervene under Article 28, Kearns J. considered that "some quite egregious disregard of constitutional duties and obligations must take place" and emphasised that the question of "participation" was primarily a matter for the legislative and executive organs of government: [2003] 2 IR 468, at 515-516. In *Dubsky*, the plaintiff sought to challenge the overflying, landing and refuelling by U.S. aircraft within the State in the context of the UN-mandated military action taken against Afghanistan. The Dáil had passed no resolution in respect of this military action. According to Macken J., it was "wholly appropriate that courts should adopt the same highly restrained approach to the question of whether and in what circumstances the executive arm of a government should take decisions relating to war or armed conflict or hostilities of whatever nature": [2007] 1 IR 63, at 92-3.

participation in the NATO-led Partnership for Peace and elements of the EU's security and defence policy. [62]

More generally, the Government's conduct of foreign affairs, as much as of domestic policy, forms part of its general accountability to the Dáil pursuant to Article 28.4 of the Constitution. As Murnaghan J. recognised in *Boland*, in relation to matters of policy, the Government's "primary responsibility" is to the Dáil.[63] Aside from the context of approving agreements involving a charge upon public funds or enacting legislation giving effect to international obligations, the accountability of the Government to the Oireachtas takes a number of forms such as debates on foreign policy issues[64] and answers to parliamentary questions.[65] Pressing political matters aside, this "consideration" takes place in seemingly slow-moving bureaucratic contexts such as the inter-departmental consultations which are often coordinated by the Department of Foreign Affairs in relation to international agreements. Even where the Dáil's approval must be sought in accordance with Article 29.5.2°, as already outlined, there is, alas, very little, if anything, that the Dáil can do by way of influencing its terms: the exact terms of the agreement are put before it for debate and almost inevitable approval. As in the case of ordinary

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[62] See s.2 of the Defence (Amendment)(No.2) Act, 1960 ("Despatch of contingents of the Permanent Defence Force for service outside the State with International United Nations Forces").

[63] White Paper, note 24, at 353.

[64] As the White Paper on Foreign Policy recognised, "the most frequent involvement of the Oireachtas arises through the debate of foreign policy issues and the tabling of Parliamentary Questions by members of the Dáil", which "allow the members of the Dáil to enquire into any aspect of foreign policy"; it also noted that "every year the Dáil holds a major debate on foreign policy in the context of its examination of the Estimates for funds to be expended on Public Services" and that "both Houses of the Oireachtas also hold frequent debates on matters of immediate foreign policy interest". See White Paper, note 24, at 332.

[65] While members of the Dáil might place some pressure on Government in relation to particular treaty obligations or other issues of foreign policy through oral or written questions or otherwise in parliamentary debate, whether Ireland signs, ratifies or otherwise becomes party to agreements, what agreements these may be and when such action is to take place if ever, are all, subject to the limitations already outline, matters squarely within ambit of the executive power in external relations. Often inquiries are rebuffed with the standard-form responses: the matter might be getting "active consideration" (although this "active" consideration may go on for some time before it yields any conclusions): See e.g. in respect of the Convention on the Transfer of Sentenced Persons, which was eventually ratified and implemented into Irish law in 1995, 402 Dáil Debates 197 (24 October, 1990) and 407 Dáil Debates 2007 (2 May, 1991); "further consideration of [an agreement's] terms" might be required "due to their complexity" (in these cases, even more time will generally be required before any action is to take place): accession to the Vienna Convention on the Law of Treaties (which eventually took place on 7th August 2006) was an example of this phenomenon: 486 Dáil Debates 258 (28 January, 1998); 523 Dáil Debates 275 (3 October, 2000); 612 Dáil Debates 993 (14 December, 2005). More generally, the issues must be considered in light of the "the ongoing assessment and prioritisation of Ireland's international commitments": 492 Dáil Debates 126 (17 June, 1998), 548 Dáil Debates 122 (7 February, 2002), 549 Dáil Debates 1170 (27 February, 2002), 578 Dáil Debates 1017 (28 January, 2004) in respect of the UN Convention in relation to the protection of all migrant workers and members of their families. Although they can be "quite effective in probing some alleged ministerial misdemeanour", Gallagher states that parliamentary questions "are not designed to enable the monitoring of government policies on a continuous basis": Gallagher, in Coakley and Gallagher eds, *Politics in the Republic of Ireland* (3rd ed, Routledge/PSAI, 1999) at 128.

legislation, there is often a "ritualistic quality of debates" which tend to be "highly predictable affairs".[66] According to Gallagher, if there is to be continuous monitoring of Government action, "the most appropriate mechanism is a system of committees".[67] Although they "never fundamentally change" the relationship between Government and Parliament, such committees "may slightly adjust" it.[68] Since 1997, the Joint Committee on Foreign Affairs has been established to this end, thereby bringing "Irish parliamentary practice into line with other parliaments in Western Europe".[69] Other jurisdictions have developed more effective methods for subjecting international treaty-making to parliamentary scrutiny; for example, in Australia, through the institution of a parliamentary committee specifically examining treaty obligations.[70] In an era of vast international law-making, raising of itself questions of legitimacy and democracy, the case for an effective parliamentary committee entrusted with the task of scrutinising the State's international treaty commitments is strong.[71] It remains to be seen whether future parliamentary or constitutional reform adventures will explore such a possibility.

To conclude, the provisions just outlined give the Oireachtas an important role in principle, placing democratic safeguards on the broad executive power, and they could, if used effectively, provide the basis for a more vigorous scrutiny of the Government's exercise of international relations.[72] However, it is clear that in practice the role the Oireachtas in this field, as in so many others, is largely passive and its influence is consequently quite limited.

E. The Role of the Courts

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[66] Gallagher, note 65, at 193.
[67] Gallagher, note 65, at 194.
[68] Gallagher, note 65, at 197.
[69] Keatinge and Laffan, "Ireland: a small open polity" in Coakley and Gallagher eds, note 65, at 340. For the Committee's terms of reference, see 482 Dáil Debates 235-238.
[70] Harrington, note 49, at 131-136. See the website of the Joint Standing Committee on Treaties: http://www.aph.gov.au/house/committee/jsct/ (last visited 25 October 2010).
[71] Such a mechanism has already been established with a view to examining Ireland's EU obligations.The Joint Committee on European Scrutiny, which was established in October 2007, fulfils its role within the framework of the European Union (Scrutiny) Act 2002. In this context, it should also be noted that the Irish Human Rights Commission has called for human-rights proofing of all forthcoming legislation: see Irish Human Rights Commission, *Promoting and Protecting Human Rights in Ireland – Strategic Plan 2007-2011* (2007), available online at www.ihrc.ie. While scrutiny for compliance with international human rights obligations is of great importance, so too is scrutiny for compliance with other obligations under international law.
[72] Finally, with respect to the President, who forms part of the Oireachtas in this context, Article 28.5.2 provides that "the Taoiseach shall keep the President generally informed on matters of domestic and international responsibility": On the presidential power in this context, see Hogan and Whyte, note 18, at paras. 4.1.22 and 4.1.27.

In contrast to the Oireachtas, no express role is envisaged for the courts in the constitutional framework governing international relations.[73] However, the courts have recognised that, while special deference must be afforded to the Government in this sphere, they have a "right and duty" to intervene in cases where the Government does not act in accordance with the Constitution.[74] The basis for intervention in such cases arises from the fact that, in accordance with Articles 29.4.1 and 28.2, the executive power must be exercised by the Government "subject to the provisions of the Constitution" and the power vested in the superior courts by virtue of Article 34 of the Constitution. According to Walsh J. in *Crotty*, the Government, as a creature of the Constitution, is "not empowered to act free from the restraints of the Constitution".[75] The courts' duty to uphold the Constitution "includes restraining the Government from freeing themselves or purporting to free themselves from the restraints of the Constitution"[76] and "to the judicial organ of government alone is given the power conclusively to decide if there has been a breach of constitutional restraints".[77]

However, although the courts have recognised this "right and duty" to intervene in external relations in order to uphold the Constitution, because of the primacy of the Government in this field as well as its distinctive characteristics when compared to other policy areas, they have also recognised that this jurisdiction must be carefully exercised. In the first instance, a presumption of constitutionality applies to the acts of Government just as it applies to the acts of the Oireachtas. Moreover, the courts have, as Fitzgerald C.J. put it in *Boland*, "no power, either express or implied, to supervise or interfere with the exercise by the Government of its executive functions, unless the circumstances are such as to amount to a clear disregard by the Government of the powers and duties conferred upon it by the Constitution".[78] The courts have identified a number of circumstances in which they may intervene with the executive power in external relations.[79] The courts have also

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[73] *Crotty v. An Taoiseach* [1987] IR 713, at 792 (per Griffin J.).
[74] [1987] IR 713, at 773-4 (per Finlay CJ).
[75] [1987] IR 713, at 778.
[76] [1987] IR 713, at 779.
[77] [1987] IR 713, at 778.
[78] [1974] IR 338, 362. Note also the arguably higher standard of "quite egregious disregard" invoked by Kearns J. in *Horgan v. An Taoiseach* in the context of Article 28.3.3.
[79] First, in *Crotty*, the most striking example of judicial activism in the field of international relations, the majority of the Supreme Court held that the Court must intervene to restrain the Government from ratifying Title III of the Single European Act (SEA) - which placed the cooperation among European Member States in the field of foreign policy, European Political Cooperation, on a formal footing within the Treaties - where to do so would amount to "a diminution of Ireland's sovereignty which is declared in unqualified terms in the Irish Constitution" and would therefore require "the State to act in

asserted jurisdiction to review both international agreements themselves as well as implementing legislation.[80] In other areas, for example, the declaration of or participation in war under Article 28.3.3, the courts, while recognising in principle the justiciability of those questions, have shown even greater deference to the Government and the Oireachtas and their respective decision-making roles in this field.[81] So too, in a case alleging that the State had breached rules of customary international law relating to neutrality, the courts have stepped back from giving internal effect to such rules of customary international law, at least through Article 29.3, under which the State accepts the generally recognised principles of international law in its relations with other States.[82] The proper delimitation of the judicial role in this sphere remains to be fully clarified. While, as Budd J. said in *Boland*, "the judiciary has its own particular ambit of functions under the Constitution", mainly dealing "with justiciable controversies between citizen and citizen or the citizen and the State and matters pertaining thereto",[83] the concept of

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the sphere of foreign relations in a manner which would be inconsistent with constitutional requirements": [1987] IR 713, at 788 (per Henchy J.). A constitutional amendment was therefore required in order for the State to ratify the Single European Act: Tenth Amendment of the Constitution Act, 1987. Secondly, while the dissenting judges in *Crotty* (Finlay C.J. and Griffin J.) took a different view of the implications of Title III of the SEA than that of the majority, they recognised that the Court could intervene "in order to protect or secure the constitutional rights of individual litigants where such rights have been or are being invaded by those activities or where activities of the executive threaten an invasion of such rights": [1987] IR 713, at 773 (per Finlay C.J.). There may be other circumstances where the courts consider themselves bound to intervene in order to uphold the Constitution. A now historical example is that of the original Articles 2 and 3 of the Constitution which the Supreme Court recognised as constituting a claim by the State "as of legal right" to the territory of Northern Ireland: on this, see the discussion by the Supreme Court in *McGimpsey v. Ireland* [1990] 1 IR 110, at 119 (per Finlay C.J.).

[80] In *Crotty*, while remarking that "as a general rule neither the Government nor the Oireachtas can be restrained until their intentions are translated into acts", and thus "statements of the Government policy as such are not restrainable by the Courts", Walsh J. proceeded to emphasise that "if the policies are translated, for example, into treaties then different considerations arise": [1987] IR 713, at 778. Thus, in *Boland*, the Supreme Court refused to intervene in respect of a declaration which had been made by the Governments of Ireland and the United Kingdom on account of the fact that it constituted a declaration of policy only: [1974] IR 338. In *Crotty*, the Court intervened in respect of a treaty which had been approved by the Dáil, signed by the President but the instrument of ratification for which had not been deposited with the Italian Government. However, in two other cases, the courts showed their willingness to intervene in respect of duly ratified treaties. In *Gilliland* [1987] IR 201, as already discussed, the Supreme Court found that the terms of the Ireland-US Extradition Treaty had not been approved by the Dáil in accordance with Article 29.5.2° and the Treaty was therefore invalid as a matter of Irish law. In *McGimpsey* [1990] 1 IR 110, the plaintiffs challenged the validity of the Anglo-Irish Agreement of 1985, which they alleged was invalid having regard to the provisions of Articles 2 and 3 of the 1937 Constitution. While the Supreme Court ultimately rejected this challenge on its merits, the fact that the act challenged was a duly ratified international agreement did not prevent it from conducting such an examination. For a discussion of the far-reaching nature of this jurisdiction, see Symmons, "International Treaty Obligations and the Irish Constitution: The McGimpsey Case" (1992), 41 *ICLQ* 311.

[81] See *Horgan v. Ireland* [2003] 2 IR 468, at 513. See the comments of Collins and O'Reilly, *Civil Proceedings and the State* (2nd ed, Thomson Round Hall, 2004), at 167-168.

[82] See *Horgan v. Ireland* [2003] 2 IR 468, discussed further in Chapter 4., at 212-215 and 230-234.

[83] [1974] IR 338, at 366.

"justiciability", notwithstanding its potential utility and applicability, has been rarely invoked in the context of external relations. As discussed in Chapter 4, that concept has been used, arguably too bluntly, within the context of Article 29.3 in the *Horgan* case.[84] However, in light of recent shifts in constitutional jurisprudence more generally,[85] it may well take on a greater role in the analysis of issues in the field of external relations in the future.

In conclusion, while the courts have carved out a far-reaching role in patrolling the executive power in external relations on the basis of their duty to ensure that the Constitution is upheld, this is nonetheless an area in which the courts have generally emphasised their role as being closely circumscribed and, where the courts have intervened, they have done so in defence of the fundamental principles of popular sovereignty and parliamentary democracy which underpin the Constitution.

F. The Role of the People

Ultimately, it is the people whose right it is, in accordance with Article 6, "in final appeal, to decide all questions of national policy, according to the requirements of the common good". This provision has been given meaning and life by the Supreme Court, particularly in the *Crotty* case, where the radical effect of the Court's intervention can be said, as Hogan has, to be "at least arguably consistent with the concepts of popular sovereignty which underlie the Constitution".[86] As Walsh J. recognised in that case, holding that the Government could not ratify Title III of the Single European Act in the absence of a constitutional amendment, if the Government wished to qualify the sovereign power to formulate and pursue its foreign policy, it was "not within the power of the Government itself to do so" and, to do so, recourse would be required to the people who, in the last analysis, were "the guardians of the Constitution".[87] In similar terms, Henchy J. stated that the "ultimate source and limits of the Government's powers in the conduct of foreign relations" was to be found in the Irish people in accordance with Article 6 of the Constitution. While there was no "constitutional bar to a non-binding arrangement by the State to

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[84] Once again, see *Horgan v. Ireland* [2003] 2 IR 468, a recent example of its use, where Kearns J. found that Articles 29.1 to 29.3 were not invocable at the behest of individual citizens although the (arguably more sensitive) issue of participation in war under Article 28 was conceded to be justiciable. See further the discussion in Chapter 4, in particular at 230-234.

[85] In particular, one thinks of the effect of the decision of the Supreme Court in *T.D. v. Minister for Education* [2001] 4 IR 259. See Collins and O'Reilly, note 81, at 171-177.

[86] Hogan, "The Supreme Court and the Single European Act" (1987) 22 *Ir Jur* 55, at 70.

[87] [1987] IR 713, at 783.

consult with other states in the conduct of its foreign policy", the Government could not ratify an international agreement which bound the State to act in the sphere of foreign relations in a manner inconsistent with the Constitution.[88]

So it is that, on a number of occasions, the Government and the Oireachtas have put matters touching upon the "international relations" of the State to the people by way of referendum. International agreements necessitating a change in the constitutional text are exceptional. Adapting the State's fundamental law so as to align it with its international commitments is a far-reaching step, particularly so in the case of a State such as Ireland in which any amendments must be made by way of referendum, and has been reserved for treaties of special importance only.[89] The first occasion on which the Constitution was amended in order to allow the State to become party to an international agreement was on Ireland's accession to the European Communities in 1972.[90] A constitutional amendment was thus necessary to accommodate the distinct character of the European Treaties; the means chosen for such accommodation was amendment of Article 29, inserting a provision allowing the State to become party to the Treaties and a provision protecting any laws, acts or measures "necessitated by the obligations of membership", the scope of which was the subject of scrutiny in *Crotty*. In its judgment on Title II of the SEA,[91] the Supreme Court unanimously upheld the validity of the European Communities (Amendment) Act, 1986 by which the Oireachtas had sought to give effect to it, because the amendments contained therein did not, in contrast to those of Title III, go beyond "the essential scope and objectives" of the original constitutional amendment. Since then, partly as a result of the decision in *Crotty* on Title III of the SEA, and partly as a result of the far-reaching changes which have been made to the Treaties, a succession of referendums has taken place in response to the succession of reforms of the Treaties: from Maastricht through Amsterdam and Nice to the

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[88] [1987] IR 713, at 787. Similar sentiments were expressed by Budd J. in the *Boland* case.

[89] In some cases, the Government of the day might prefer to make a reservation or interpretative declaration to a treaty where it might conflict with the Constitution instead of undertaking the weighty and, at times, precarious process of seeking a constitutional amendment in order to give effect to the treaty. This is the case, for example, with a number of Ireland's reservations to the main United Nations human rights conventions.

[90] That accession would necessitate constitutional amendment was evident in light of the nature and scope of the European Treaties themselves as well as the interpretation given to them by the European Court of Justice in its early jurisprudence. Not only did the Treaties contained provisions directly applicable in national law, they also established political and judicial organs with the power to make and adjudicate upon the law in a manner which would bind the State within its internal legal system as well as in its relations with other Member States.

[91] [1987] IR 713, at 766-770.

current regime as established by the Lisbon Treaty.[92] As the editors of Kelly note of the amendments up to 2004, "the combined effect of these amendments is to give constitutional authority for a significant transfer of legislative, executive and juridical sovereignty to the European Union within defined – but nonetheless capacious - parameters".[93] However, referendums touching upon the State's international relations have not been confined to the EU.[94]

The real shadow of *Crotty* may lie over Ireland's membership of the United Nations. While a motion was passed in the Dáil in 1946 recommending the Government to take steps with a view to Ireland's admission to membership of the U.N.,[95] it was not until 13 December 1955 that Ireland actually joined the United Nations. When it did so, the State appears to have joined on the basis of this earlier approval by the Dáil. No referendum was held. Nor did the Oireachtas even enact enabling legislation to give effect to the obligations of U.N. membership within the Irish legal system, notwithstanding the State's obligations under the Charter and, in particular, under Article 25 of the Charter to comply with decisions of the Security Council including decisions taken under Chapter VII of the Charter which may include forcible measures. In the wake of *Crotty*, Heffernan and Whelan, writing in 1991, concluded that there was a "discernible possibility that Irish membership of the UN is unconstitutional".[96] Regardless of how a constitutional challenge to Ireland's

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[92] Notwithstanding debates as to the necessity and the desirability of referendums in the context of the Nice Treaty and, most recently, Lisbon Treaty: see e.g. Fanning, 'Lisbon is not democracy but an exercise in buck-passing' *Irish Times*, 4th April 2008; Barrett, 'Lisbon Treaty is not buck-passing by politicians', *Irish Times*, 4th April 2008.

[93] Hogan and Whyte, note 18, at 519.

[94] Following the Good Friday Agreement of 1998, a referendum was held and approved the State's ratification of the British-Irish Agreement, which formed part of the Good Friday settlement as well as the amendment of Articles 2 and 3 of the Constitution. Furthermore, a referendum was held on, and approved, the State's ratification of the Statute of the International Criminal Court (the Rome Statute), which have been described as effecting "a limited transfer (albeit in strictly defined and particular cases) of national executive and juridical sovereignty": Hogan and Whyte, note 18, at 564. Moreover, the Twenty-First Amendment to the Constitution prohibiting the death penalty also reflected Ireland's international treaty commitments under the Second Optional Protocol to the International Covenant on Civil and Political Rights to which the State acceded on 18th June 1993. See 534 Dáil Debates 840 (11 April, 2001).

[95] 102 Dáil Debates 1481 (25 July, 1946)

[96] Heffernan and Whelan, "Ireland, the United Nations and the Gulf Conflict: Legal Aspects" (1991) 3 *Irish Studies in International Affairs* 115, at 145. The Constitution Review Group recommended the insertion of a specific clause in Article 29 dealing with UN membership, which, in addition to its symbolic value, would "remove any uncertainty concerning the validity of our membership of the United Nations". The proposed provision was in the following terms: "Ireland, as a member of the United Nations, confirms its determination to comply with its obligations under the Charter of the United Nations". However, this proposal was rejected by the All-Party Committee on the Constitution in its Eighth Progress Report, the Committee taking the view that such an amendment would be "legally unnecessary having regard to the strong provisions of Article 29.1 and 29.2" and "could create legal ambiguity where none exists over the past membership of the UN or other organisations": All-Party Committee on the Constitution, *Eighth Report – Government* (Stationery Office, 2003), at

UN membership might fare today, which may be as unlikely to happen as its outcome would be impossible to predict,[97] the merits of making express constitutional provision for UN membership are clear.

In conclusion, Ireland's international obligations have been one of the most fertile sources of constitutional amendment, which has given effect to the people's right, under Article 6, "in final appeal, to decide all questions of national policy, according to the requirements of the common good" . Nonetheless, it is clear that recourse to the people is an exceptional measure required only in exceptional cases, the most prominent of which relate to the European Union and Northern Ireland.

G. Article 29.4: the Limitations Imposed by European Union Membership

In addition to the express and implied limitations in the Constitution which have just been outlined, Ireland's membership of the European Union, to which effect is given within the 1937 Constitution through Article 29.4.3° to 29.4.9°, has resulted in a much wider, and more far-reaching, set of substantive and procedural limitations on the power of the Irish Government, and indeed of the other organs of government, in the field of international relations.

In Article 29.4.3° and Article 29.4.5°, the State is afforded a "licence"[98] to join the European Atomic Energy Community and, by ratifying the Treaty of Lisbon,

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32. As part of the most recent constitutional amendment, to give effect to the Lisbon Treaty, it is interesting to observe that the new subparagraph 4 of Article 29.4 provides that "Ireland affirms its commitment to the European Union within which the Member States of that Union work together to promote peace, shared values and the well-being of their peoples". There is no doubt but that a similar amendment would be appropriate in respect of the United Nations.

[97] On the one hand, it may be observed that the courts have taken a distinctly less activist line in relation to external relations since *Crotty*, which undoubtedly represents the high watermark of judicial intervention in international relations. This is borne out by the Supreme Court's approach in *McGimpsey*, where the Court took pains to distinguish the more far-reaching implications of *Crotty* and thereby effectively confined it to its particular facts. It is clear that a similar distinguishing exercise might be conducted in relation to the United Nations Charter, particularly having regard to concordance of the first three provisions of Article 29 with the purposes and principles of the UN Charter. Moreover, as will become evident in the examination of the EU's framework of international relations, express reference to the United Nations and its principles now forms part of our broader constitutional framework, through the European Treaties. On the other hand, the obligations arising from UN membership, and in particular the binding decisions of the UN Security Council, have considerably increased in their quantity and in their effects. For example, the nature of the sanctions which the Security Council now imposes, which are often targeted at individuals and non-State actors, as opposed to States, and the quasi-legislative duties which have been imposed in the field of counter-terrorism, all emphasise the gravity and the reality of the State's obligations under the Charter. See generally Chapter 6. Moreover, subsequent constitutional practice – which has taken a cautious approach to the ratification of international agreements which may raise issues of constitutionality for example the Nice Treaty and the Rome Statute – could be regarded as indicating that an amendment would be appropriate for such a significant international agreement as the Charter.

[98] This is the terminology used by Barrington J. in the High Court judgment in *Crotty v. An Taoiseach* [1987] IR 713, at 756-760.

the European Union. Through Article 29.4.6°, constitutional immunity is afforded to, and the force of law is given to, "laws enacted, acts done or measures adopted by the State" which are necessitated by the obligations of EU membership. Insofar as the EU's international relations are concerned, this applies not only to EU legislation and decisions in that field but also the international agreements concluded by the EU in the exercise of its external competence under the Treaties. Article 29.4.7° and 29.4.8° allow the State to exercise certain specified "options and discretions" and agree to certain specified "decisions, regulations or other acts". Finally, Article 29.4.9° provides that "the State shall not adopt a decision taken by the European Council to establish a common defence pursuant to Article 42 of the Treaty on European Union where that common defence would include the State".

The radical nature of this constitutional amendment for the the 1937 Constitution, and the Irish legal system more generally, has already been discussed in Chapter 1. It is through these amendments that the Treaties form an integral part of Irish law and 'widen the scope' of Irish constitutional law.[99] In the words of Henchy J., it is as though Ireland thereby adopts a "second but transcendent constitution".[100] This "constitution" places limitations on all organs of government in the exercise of their constitutionally-granted powers. The field of international relations is no exception to such limitations. It is to these limitations that this chapter now turns.

III. LEGAL FRAMEWORK GOVERNING INTERNATIONAL RELATIONS UNDER THE EUROPEAN TREATIES

A. Evolution

In addition to being the most important and far-reaching instance of Member States' international relations, the European Union has developed into a significant actor in international relations in its own right. While it has always been important, the international dimension of the EU's activity has intensified in the past few decades and gained particular prominence during the recent debates over the proposed Treaty establishing a Constitution for Europe and the Lisbon Treaty. The EU now represents

[99] See Temple-Lang, "The Widening Scope of Irish Constitutional Law" in Curtin and O'Keeffe eds, *Constitutional Adjudication in European Community and National Law. Essays for the Hon. Mr. Justice T. F. O'Higgins* (Butterworths, 1992), 229.
[100] Henchy, "The Irish Constitution and the EEC" (1977) 1 *DULJ* 20, at 23.

a central feature of Member States' foreign policies, which have become 'Europeanised'.[101] Because of the unusual, and in many ways unique, characteristics of the EU as an international actor, and the delicate division of power between the EU and Member States in this sphere, the legal framework governing the EU's international relations is marked by its complexity and the quest for coherency, or at least improved coordination, has been ever-present. This section seeks to provide a brief overview of the structure of the EU's international relations in order to place the legal framework of Ireland's international relations in its proper context.[102]

In short, as well as providing a forum for consultation and coordination of Member States' foreign policies generally, the EU is also vested with specific competence in an array of policy areas with a significant external dimension, perhaps none more so than the areas of international trade and development. In the exercise of this competence, the EU undertakes, both independently and alongside Member States, international obligations which bind both the EU and its Member States. Recognised as forming part of EU law, many of these obligations are thereby given effect within Member States' legal system. The manner in which they do so in the Irish legal system, and its effects on the general system for the implementation of international law therein, is explored in the following chapters.

Because of the evolving character of the EU's role, it is important to understand that role within its historical context. Initially, at the time of the Treaty of Rome, the EEC had a relatively small number of express powers with an external dimension, principally in the sphere of trade and association agreements.[103] This small pool of express powers was soon complemented by the recognition of implied

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[101] See e.g. Tonra, *The Europeanisation of National Foreign Policy: Dutch, Danish and Irish Foreign Policy in the European Union* (Ashgate, 2001).

[102] In light of this objective, it is not possible to deal with many of the historical developments, complex legal debates and finer details of this broad field, which has been the subject of extensive literature, burgeoning in recent years in line with the increased practical and political importance of this area of activity. See in particular MacLeod, Hendry and Hyett, *The External Relations of the European Communities* (Oxford University Press, 1996); McGoldrick, *International Relations Law of the European Union* (Longman, 1997); Eeckhout, *External Relations of the European Union* (Oxford University Press, 2004); Koutrakos, *EU International Relations Law* (Hart Publishing, 2006); De Baere, *Constitutional Principles of EU External Relations* (Oxford University Press, 2008). Many important edited volumes have also appeared recently including: Cremona and de Witte eds, *EU Foreign Relations Law: Constitutional Fundamentals* (Hart Publishing, 2008); Cremona, ed, *Developments in EU External Relations Law* (Oxford University Press, 2008); Dashwood and Maresceau eds, *Law and Practice of EU External Relations* (Cambridge University Press, 2008); Wouters, Nollkaemper and de Wet eds, *The Europeanisation of International Law: the Status of International Law in the EU and its Member States* (TMC Asser Press, 2008). Earlier volumes of importance include Dashwood and Hillion eds, *The General Law of E.C. External Relations* (Sweet & Maxwell, 2000) and Koskennemi ed, *International Law Aspects of the European Union* (Kluwer, 1998).

[103] Article 113 EEC; Article 238 EEC.

powers, in respect of which the Court of Justice developed "a broad, controversial and complex theory" ,[104] thereby permitting the Community to engage in external action in other fields of activity in certain circumstances defined in the Court's jurisprudence. However, as the organisation developed, from EEC through EC to EU and EC and now EU, further areas of competence were expressly recognised by the Treaties. Furthermore, the practice of 'mixity', whereby the EU and Member States both concluded international agreements in areas of shared competence, which continues to be a distinctive feature of the EU's international relations, also took shape and became central to the practice of international relations within the EU.

Moreover, throughout this period, the challenges facing the EEC, and more recently the EU, as a new entity on the international stage became obvious. First, there was an issue as to whether, under the Treaties, the Community, and later the Union, enjoyed international legal personality. While practice resolved, and the Court confirmed,[105] that this was so in respect of the Community, notwithstanding an express provision to that effect akin to that present in the case of EURATOM, the question continued to excite controversy, at least academically, with the establishment of the European Union.[106] More significantly, there were issues as to the exact scope of this international legal personality and the consequences of the nature of the EU's legal personality for its participation within international organisations, where membership was often confined to States.[107]

At the same time, political cooperation in foreign policy developed from initially *ad hoc* and informal consultation outside the Treaties into more formal and wide-ranging structures recognised by the Treaties: in this regard, European Political Cooperation, which commenced in the early 1970s and was given a basis in the Treaties in Title III of the Single European Act (which was at the heart of the *Crotty* case in Ireland[108]) gave way to the Common Foreign and Security Policy, the second pillar of the Union under the Maastrict Treaty, which continues to exist, now in the form of Chapter 2 of Title V of the TEU.

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[104] Craig and de Burca, *EU Law: Text, Cases and Materials* (4th ed., Oxford University Press, 2007), at 128.
[105] Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263.
[106] For a comprehensive account of this debate with references to the relevant literature, see Eeckhout, note 101, at 154-160.
[107] Among a vast literature, two recent contributions offer particular insight into some of these issues: de Witte, "The Emergence of a European System of Public International Law: the EU and its Member States as Strange Subjects" in Wouters, Nollkaemper, and de Wet eds, note 101, at 39; Hoffmeister, "The Contribution of EU Practice to International Law" in Cremona ed, note 101, at 37.
[108] [1987] I.R. 713.

While the external action of the EU has, by its nature, certain special characteristics which distinguish it from the Union's internal action, it is nonetheless governed by the same core principles, in particular the principle of conferral, according to which the EU only enjoys such competence as the Member States have agreed to confer upon it. Moreover, because of its status as a "strange subject" of international law and because of the realities of international relations, the principle of loyal cooperation between the Union and Member States has taken on a special importance in this sphere.[109]

Moreover, the Treaties have always contained a special provision governing the relationship between them and pre-existing international agreements of Member States. This is now embodied in Article 351 TFEU which, in its first paragraph, provides:

> The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.

Paragraph 2 places an obligation on Member States to take all appropriate steps to eliminate any incompatibilities established between such agreements and the Treaties. In *Attorney-General v. Burgoa*,[110] a preliminary reference from the Cork Circuit Court arising from the prosecution of the master of a Spanish fishing vessel prior to Spain's accession, the Court of Justice had to consider the relationship between the London Fisheries Convention of 1964 (to which both Ireland and Spain were parties) – on which Burgoa relied in his defence – and EU fisheries legislation. The Court upheld the application of the EU legislation on the basis that the London Fisheries Convention had been superseded by the interim regime created by an agreement between Spain and the then European Economic Community, even though this agreement had not been signed or concluded at the

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[109] The phrase is from de Witte, note 106. The general expression of that principle (formerly Article 10 (and before that Article 5) EC) is now to be found in Article 4.3 TEU. The power in external relations is divided along two major axes: in the first instance, as the EU gains more competence in specific areas of external action, the vertical division of power between the EU and the Member States; at the same time, as that power accumulates within the EU, the internal balance of power between the EU institutions - the Council, the Commission and the Parliament, in particular, as well as the supervisory role of the Court – also becomes of central importance, just as is the case within Member States' constitutional systems. The allocation of power in international relations within the EU is thus more complex than that within individual Member States and it is perhaps inevitable that this complexity is reflected in the relevant legal structures.

[110] Case 812/79 *Attorney General v. Burgoa* [1980] ECR 2787.

time of the events giving rise to the domestic proceedings.[111] While this is not the sole instance of this provision been invoked in an Irish context,[112] in practice there appears to have been relatively little difficulty in adjusting Ireland's prior international agreements, insofar as they existed, to the new order created by the European Treaties.[113]

In analysing the legal framework of the EU's international relations, it is important to draw a fundamental distinction between the specific areas of external competence, express or implied, which the Treaties vest, in whole or in part, in the Union and the general coordination of foreign policies which takes place within the context of the Common Foreign and Security Policy. Before analysing both of these dimensions in turn, however, it is necessary to situate them within the overarching constitutional framework of the Union.

B. The Overarching Legal Framework

Article 1 TEU provides that "by this Treaty, the High Contracting Parties establish among themselves a European Union.... on which the Member States confer competences to attain objectives they have in common" and that the Union "shall replace and succeed the European Community". The principle of conferral alluded to in Article 1 TEU is elaborated upon by Article 5 TEU which provides that "the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein". It also provides, reiterating Article 4 TEU, that "competences not conferred upon the Union in the Treaties remain with the Member States".[114] These fundamental principles

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[111] For a critical analysis, see Klabbers, *Treaty Conflict and the European Union* (Cambridge University Press, 2009), at 127-129.

[112] See also Case T-76/89 *Independent Televisions Production Ltd. v. Commission* [1991] ECR II-00575, at paras. 73-77.

[113] This is in part explicable by the relatively sparse treaty practice of the State in the period preceding accession and in part the fact that, in those areas where there was considerable practice (e.g. double taxation agreements), no particular problems of compatibility existed with the Treaties. In other areas, which subsequently became problematic (e.g. bilateral investment treaties), Ireland has no such treaties with third states.

[114] Article 5.1 TEU also states that the "use of Union competences" is governed by the principles of subsidiarity – i.e. that "in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives fo the proposed action cannot be sufficently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level" – and of proportionality, that is to say, that "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties".

apply across all areas of EU competence, including those relating to international relations.[115]

Article 3.5 TEU sets out the EU's objectives in its international relations, which are wide-ranging and ambitious.[116] These objectives are further elaborated upon in Chapter 1 ("General Provisions on the Union's External Action") of Title V of the TEU, which is novel in its articulation and presentation of common objectives across the broad field of international relations, applying both to CFSP as well as areas of external action under the TFEU. This forms part of the effort within the present Treaties to increase coherence in EU's international relations.[117] In accordance with Article 21.2 TEU, "the Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations" in order to fulfill its objectives, which are then set out in detail. Having regard to the breadth of the Union's international objectives and activities, the importance of coherence is clear.[118] The orientation of the EU's international action is set at the highest political level, by the Member States acting

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[115] Opinion 1/03 (*Lugano Convention*), [2006] ECR I-1145, para.132. However, as Dashwood has noted, those provisions of the Treaties dealing with the CFSP lack the specific enumeration of areas of competences which is now present under the TFEU. See Dashwood, "The Relationship between the Member States and the European Union/European Community" (2004) 41 *CMLR* 357.

[116] In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

[117] Article 21 TEU provides, in section 1, that:

> The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

Having set out these guiding principles, it is stated that the "Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles" and "shall promote multilateral solutions to common problems, in particular in the framework of the United Nations." In light of the earlier discussion of the constitutionality of Irish membership of the European Union, the strong emphasis on the United Nations is interesting.

[118] For a recent discussion, see Hillion, "Tous pour un! Un pour tous! – coherence in the external relations of the European Union" in Cremona ed, note 101, at 10. This is echoed in Article 21.3 TEU which provides, in paragraph 1, that the Union shall respect the foregoing principles and pursue these objectives in all of the different areas of its external action and, in paragraph 2, that "[t]he Union shall ensure consistency between the different areas of its external action and between these and its other policies". This also emerges in Article 23 TEU, in respect of the CFSP, and Article 205 TFEU, in respect of specific areas of external action, which both state that "[t]he Union's action on the international scene ... shall be guided by the principles, pursue the objectives of, and be conducted in accordance with, the general provisions laid down in Chapter 1 ...". The task of ensuring consistency is placed on the Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy (the High Representative), which are obliged to cooperate to this effect.

unanimously in the European Council.[119] Article 47 TEU provides that the Union "shall have legal personality".[120]

Before examining the detail of this competence, it is important to highlight in broad terms certain important features of the division of power in international relations within the European Union. First, in relation to the vertical axis of power between the Union and Member States, what is striking is not only the extent to which power is transferred from the Member States to the Union *simpliciter* but the extent to which power is shared and synergised as the Union and Member States coordinate their international relations in novel and complex ways. Secondly, in relation to the horizontal axis of power between the different EU institutions, the position varies dramatically according to the basis upon which the institutions act. In the context of the CFSP within the TEU, the European Council and the Council, composed of the Member States, play a predominant role while the newly established High Representative and the European Commission are also active and important participants. Notwithstanding certain advances in the Treaty of Lisbon, the positions of the European Parliament and the Court of Justice play a very marginal role. In the context of external action under the TFEU, by contrast, while the roles of the Council and the Commission are of great importance, the Parliament has become

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[119] Article 22 TEU is directed towards this coordination, providing in section 1, that "the European Council shall identify the strategic interests and objectives of the Union", its decisions in this respect relating both to the CFSP and to other areas of the external action of the Union. Such decisions "may concern the relations of the Union with a specific country or region or may be thematic in approach" and "shall define their duration, and the means to be made available by the Union and the Member States". The decision-making process is then outlined, providing that the "European Council shall act unanimously on a recommendation from the Council, adopted by the latter under the arrangements laid down for each area", that the decisions "shall be implemented in accordance with the procedures provided for in the Treaties" and that the "High Representative of the Union for Foreign Affairs and Security Policy, for the area of common foreign and security policy, and the Commission, for other areas of external action, may submit joint proposals to the Council". The High Representative, an innovation of the Treaty of Lisbon, builds on the role of the previous High Representative for the CFSP, and plays the multifaceted role envisaged for the Minister for Foreign Affairs in the Constitutional Treaty, as Vice-President of the European Commission and chair of the Foreign Affairs Council as well as agent of the Council itself.

[120] While the provision does not refer explicitly to the Union's *international* legal personality, in light of the Court's decision in *ERTA* in respect of the Community, the provision must be understood as encompassing international legal personality: Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263. Further evidence of this international legal personality is to be seen in the explicit provision which is made for: treaty-making, both within the context of the CFSP (Article 37 TEU) and within other areas of external action (Article 216 TFEU); for participation in international organizations (Article 34 TEU and Articles 220 and 221 TFEU); and for the diplomatic representation of the EU, through the establishment of the European External Action Service as well as the general coordination of Union and Member States' delegations (Articles 27.3 and 35 TEU and Articles 220 and 221 TFEU). As well as these general principles, the core constitutional framework also raises other issues of international law which go beyond mere implementation of common policies or particular policies within the field of external action: for example, the accession of the Union to the European Convention on Human Rights (Article 6. 2 TEU).

integrally involved in recent times and the influence of the Court of Justice, traditionally and to this day, has been strong.

Having set out in general terms, the overarching legal framework of the Treaties governing the EU's international relations, it is now necessary to consider in more detail the two principal mechanisms through which these relations are conducted: first, the specific areas of external action governed by the TFEU; secondly, the Common Foreign and Security Policy.

C. External Action under the Treaty on the Functioning of the European Union

As Dashwood[121] has forcefully argued, notwithstanding the frequency with which the Court conflates the issues, there are two distinct questions which need to be addressed in identifying the competence of the EU in external action: first, whether the EU has competence to act, whether that is expressly to be found in the text of the Treaties or falls to be implied; secondly, the extent of that competence and, specifically, whether it is an exclusive, shared or supporting character.

While individual provisions throughout the TFEU identify specific areas of external competence, the core of this competence is identified in Part Five of the TFEU, entitled external action by the Union. Part Five also deals with a number of general matters relating to the Union's competence in external action.[122] Most importantly, Part Five also sets out the treaty-making procedure to be followed within the Union.

In order to appreciate the division of powers between the Union institutions in this sphere, it is useful to set out the salient elements of the treaty-making procedure defined in Article 218 TFEU.[123] Paragraph 3 provides that the Commission[124] "shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's

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[121] Dashwood, "Implied External Competence of the EC" in Koskenniemi ed, note 101, at 113.

[122] Thus, for example, Title VI deals with the Union's "relations with international organisations and third countries and Union delegations". Title VII, the "solidarity clause", introduced by the Treaty of Lisbon, provides, in Article 222.1 TFEU, that "the Union and its Member States shall act jointly in a spirit of solidarty if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster".

[123] Article 218.1 TFEU specifies that this procedure is "without prejudice to the specific provisions laid down in Article 207", relating to the common commercial policy.

[124] Or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the CFSP.

negotiating team". However, it is for the Council to "authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them".[125] The adoption of decisions by the Council, on a proposal of the negotiator, "authorising the signing of the agreement and, if necessary, its provisional application before entry into force" and "concluding the agreement" are envisaged in paragraphs 5 and 6 respectively. In certain circumstances, detailed in paragraph 6, mainly in the case of politically or economically significant international agreements, the Council must obtain the consent of the European Parliament before adopting its decision to conclude an agreement.[126] In other cases, paragraph 6 merely provides for the adoption of the decision by the Council "after consulting the European Parliament".[127] In relation to the voting criteria, paragraph 8 provides that the Council "shall act by a qualified majority throughout the procedure" although it goes on to enumerate certain circumstances in which unanimity is required.[128] Finally, for present purposes, paragraph 11 provides that a Member State, the European Parliament, the Council or the Commission "may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties" and that, where the opinion of the Court is adverse, "the agreement envisaged may not enter into force unless it is amended or the Treaties are revised". Having examined these general provisions, it is now necessary to examine the specific competences conferred upon the EU in the field of international relations.

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[125] Article 218.2 TFEU. Furthermore, paragraph 4 provides that the Council "may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted."

[126] These circumstances are the following: (i) association agreements; (ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms; (iii) agreements establishing a specific institutional framework by organising cooperation procedures; (iv) agreements with important budgetary implications for the Union; (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required. This provision does not apply to agreements relating exclusively to the CFSP. It also stipulates that the Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent.

[127] It continues: "The European Parliament shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act". Paragraph 10 also provides that the European Parliament "shall be immediately and fully informed at all stages of the procedure".

[128] These include: "when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article 212 with the States which are candidates for accession" as well as "the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms", the decision concluding this agreement entering into force "after it has been approved by the Member States in accordance with their respective constitutional requirements".

(i) Express Competence

In contrast to the very limited provision made in the founding Treaties, the current Treaties vests express competence in the Union to act in a wide range of areas of external action, both within Part V and beyond. First and foremost, Title II of Part V deals with one of the longstanding, and arguably the most important, areas of EU external action, the common commercial policy, which is the external reflection of the EU's internal market competence and provides the basis for its role as the world's leading trade power.[129] The inclusion of foreign direct investment in the common commercial policy marks an important expansion of its scope under the TFEU.

Secondly, Title III of Part Five deals with a number of different aspects of the EU's cooperation with third countries. Chapter 1 concerns the Union's development cooperation policy has "as its primary objective the reduction and, in the long term, the eradication of poverty".[130] Chapter 2 deals with economic, technical and financial cooperation measures, including assistance, are aimed at "third countries other than developing countries".[131] The Union's operations within the field of humanitarian aid "shall be intended to provide ad hoc assistance and relief and protection for people in third countries who are victims of natural or man-made disasters in order to meet humanitarian needs resulting from these different situations".[132] The action of the Union and Member States in these areas are designed to "complement and reinforce each other".[133]

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[129] Article 207, which replaces Article 133 EC, defines that policy as being based "on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies".

[130] Article 208.1 TFEU.

[131] Article 212.1 TFEU.

[132] Article 214.1 TFEU.

[133] Articles 208.1 TFEU (development cooperation); Article 212.1 TFEU (economic, technical and financial cooperation); Article 214.1 TEU (humanitarian aid). In other words, the exercise by the EU of its competence in these fields does not serve to exclude Member State action by reason of pre-emption which applies in certain areas of shared competence. The measures necessary for the implementation of these policies are adopted in accordance with the ordinary legislative procedure (Article 209 TFEU (development cooperation); Article 212.2 TFEU (economic, technical and financial cooperation); Article 214.3 TFEU (humanitarian aid)) and the Union may also conclude international agreements although this is specifically stated to be "without prejudice to Member States' competence to negotiate in international bodies and to conclude agreements" (Article 209.2 TFEU (development cooperation); Article 212.3 TFEU (economic, technical and financial cooperation); Article 214.4 TFEU (humanitarian aid)). Also in this vein, Article 210 TFEU specifically deals with the coordination of EU and Member States' development cooperation policies "in order to promote the complementarity and efficiency of their action" while Article 211 provides

Thirdly, Title IV of Part Five deals with "restrictive measures", which allows the Union to impose economic sanctions, an increasingly important tool in the EU's external relations arsenal, particularly in the implementation of UN Security Council resolutions.[134]

Fourthly, another important cluster of competences, which stretch across both the TEU and the TFEU as well as different parts of the TFEU itself, is that relating to the EU's special relationships with third countries. Article 8 TEU states that the EU "shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation" and that it may, for these purposes, "conclude specific agreements with the countries concerned", which may contain "reciprocal rights and obligations as well as the possibility of undertaking activities jointly". Article 217 TFEU is to similar effect, providing that the EU "may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure". This embodies the EU's longstanding competence to conclude association, partnership and cooperation agreements, which now constitute a wide-ranging web of international obligations between the EU, its Member States and third countries.[135]

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that the EU and Member States, within their respective spheres of competence, "shall cooperate with third countries and with the competent international organisations". Similar provisions are made in respect of economic, financial and technical cooperation in Article 212 TFEU and humanitarian aid in Article 214.6 TFEU. Moreover, express attention is directed at the coordination of the development cooperation and humanitarian aid policies within the overarching framework of the United Nations (Article 208.2 TFEU and Article 214.7 TFEU respectively).

[134] Article 215, paragraph 1, envisages that, in the first place, a decision must be adopted in accordance with Chapter 2 of Title V TEU, i.e. within the framework of the CFSP, providing for "the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries". Where such a decision is adopted,"the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures" and "shall inform the European Parliament thereof". Paragraph 2 provides that, where the CFSP decision so provides, the Council "may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities". Finally, paragraph 3 declares that "the acts referred to in this Article shall include necessary provisions on legal safeguards". Article 215 TFEU is therefore an important example of the connection between CFSP decision-making and external action under the TFEU. In addition to Article 215 TFEU, see also Article 75 TFEU. See generally Chapter 6.

[135] Furthermore, Part Four of the TFEU deals with the association of overseas countries and territories, those entities which depend constitutionally on Member States but which do not form part of the EU's territory. Article 198 TFEU states that "the Member States agree to associate with the Union the non-European countries and territories which have special relations with Denmark, France, the Netherlands and the United Kingdom". This "association" has been given effect to by way of a decision of the Council: Council Decision 2001/822/EC of 27 November 2001.

Fifthly, another important area of external competence of the Union, albeit only in respect of those Member States which form part of the Euro-zone such as Ireland, is in the area of monetary policy.[136]

Beyond Part V TFEU, there are many areas in which the Treaty gives the Union express external competence. In some cases, this is evident in the explicit reference to the conclusion of international agreements: this is the case in respect of the Union's policies on border checks, asylum and immigration,[137] the Union's multi-annual framework programme for research and technological development,[138] and in its environmental policy.[139] In other cases, there is no explicit reference to treaty-making competence but more generally to "international cooperation". In a number of different fields, it is provided that "the Union and the Member States shall foster cooperation with third countries and the competent international organisations". These fields include: education and sport;[140] vocational training;[141] culture;[142] and public health.[143] In these areas, while the power to conclude international agreements is not expressly conferred on the Union, "in light of the implied powers doctrine there is no doubt", as Eeckhout has observed, "that there is competence to conclude agreements for the purpose of such co-operation".[144] In light

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[136] Article 219 TFEU gives the Council competence where it is necessary to "conclude formal agreements on an exchange-rate system for the euro in relation to the currencies of third States" (paragraph 1) and "agreements concerning monetary or foreign exchange regime matters need to be negotiated by the Union with one or more third States or international organisations" (paragraph 3). Paragraph 4 of this Article allows Member States to negotiate in international bodies and conclude international agreements "without prejudice to Union competence and Union agreements as regards economic and monetary union".

[137] Article 79.3 TFEU specifically provides that "the Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States".

[138] Article 186 TFEU permits the Union to "make provision for cooperation in Union research, technological development and demonstration with third countries or international organisations", the detailed arrangements for which "may be the subject of agreements between the Union and the third parties concerned".

[139] Article 191.4 TFEU provides that, "within their respective spheres of competence", "the Union and the Member States shall cooperate with third countries and with the competent international organisations", which "may be the subject of agreements between the Union and the third parties concerned". This power is specifically expressed to be "without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements".

[140] Article 165 TFEU.

[141] Article 166 TFEU.

[142] Article 167 TFEU.

[143] Article 168 TFEU. See also Article 78(2)(g) TFEU. Among the measures to be taken as part of the common European asylum system are included "partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection":. In the context of trans-European networks, Article 171 TFEU states that the Union "may decide to cooperate with third countries to promote projects of mutual interest and to ensure the interoperability of networks". In accordance with Article 189 TFEU, the Union "shall establish any appropriate relations with the European Space Agency".

[144] Eeckhout, note 101, at 102.

of the broad range and diversity of provisions vesting external competence in the Union which have just been outlined, it is clear that the Union, enjoys significant powers across the broad field of international relations, including in such high-profile and politically and economically important areas as trade, aid and the environment. However, as the next section makes clear, the competence of the Union in international relations is not confined to that which is expressly provided in these spheres.

(ii) Implied Competence

Notwithstanding this abundance of express competences, implied powers, as Cremona has recently argued, "remain important under the Treaty of Lisbon".[145] The jurisprudence of the Court in this sphere is both complex and constitutionally important.[146] Cremona has aptly commented, in respect of implied external competence, that "its precise extent, and the extent to which implied competences are exclusive, are still the subject of both academic discussion, institutional debate and new case law".[147]

The effect of the Treaty of Lisbon on implied external competence is unclear.[148] As already seen, Article 216(1) provides that the Union may conclude an

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[145] Cremona, note 101, at 55.

[146] Eeckhout, note 102. See also De Baere, note 101, at 16, who observes that "external relations is the only area of Community competence in which implied competences are relied upon to such an extent that they have become a fundamental part of its constitutional framework". The doctrine of implied powers is a "purely judicial construction": Dashwood, "Implied External Competence of the EC" in Koskenniemi ed, note 101, at 113. It was first recognised by the Court in the seminal case of *ERTA:* Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263. De Baere summarises the principle which flows from the ERTA case as being "that Community external competence exists whenever Community 'common rules' could be affected": De Baere, note 101, at 23. The Court later confirmed that this competence was not restricted to situations in which internal measures had already been adopted: Opinion 1/76 (*European Laying-Up Fund for Inland Waterway Vessels*) [1977] ECR 741. This case has been regarded as forming the basis of the principle of parallelism, on the one hand, according to which the internal and external competences of the Union mirror each other, and of the principle of complementarity, on the other hand, according to which external competence may be implied whenever it is necessary to attain the objective in respect of which express internal competence is conferred. On the former, see Tridimas and Eeckhout, "The External Competence of the Community and the Case-Law of the Court of Justice: Principle versus Pragmatism" (1994) 14 *YBEL* 143; Eeckhout, note 101, Chapter 3; on the latter, see Dashwood, "The Attribution of External Relations Competence" in Dashwood and Hillion eds, note 101, at 127; De Baere, note 101, at 23-29. These two decisions, which give a flavour of the foundations of the Court's approach, have spawned an expansive jurisprudence, which has in turn given rise to extensive academic commentary. However, those foundations remain at the heart of the jurisprudence implied external competence, as the recent Opinion 1/03 confirms: Opinion 1/03 (*Lugano Convention*) [2006] ECR I-1145, para. 16, 28, 29 *et seq.*

[147] Cremona, note 101, at 50.

[148] See the comments of Chalmers, Davies and Monti, *European Union Law* (2nd ed, Cambridge University Press, 2010), at 640: "Because the provisions codifies prior case law, this is not

international agreement not only "where the Treaties so provide" but also "where [it] is necessary to achieve, the framework of the Union's policies, one of the objectives referred to in the Treaties" or where it is "provided for in a legally binding act of the Union or is likely to affect common rules or alter their scope". Cremona suggests that, in Article 216(1), implied powers "may be said to have been constitutionalised by the addition of a non-specific treaty-making competence for the Union"[149], which, she argues, has "extended the possibilities" for the use of implied powers.[150] Thus, while the Treaty's provisions were designed "to increase certainty, and... to achieve a clearer definition of competence",[151] it remains to be seen whether this will be their effect.

When the extensive express competence which now exists in respect of the EU's external action is combined with the broad scope of the its implied competence, the magnitude of EU competence in this field becomes clear. However, in order to understand fully the nature of, and the limits to, this competence, it is necessary to analyse the extent to which it is exclusive to the EU or continues to be shared with Member States.

(iii) Extent of External Competence

Although the external competence of the European Union is undoubtedly extensive, in most areas, that competence is not exclusively exercised by the Union but instead shared between the Union and Member States. This has been a hallmark of the division of powers in the EU's external relations and, in particular, has given rise to the phenomenon of mixity, according to which both the Union and Member States may be parties to international agreements or represented within international organisations. With the coming into force of the TFEU, there has been an important attempt to clarify the allocation of competences as between the Union and Member States, including the extent or the nature of the competence vested in each within specific fields of policy. While areas of uncertainty continue to exist and the implications of the new provisions remain to be fully worked out, the identification

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particularly happily phrased, and this has caused some consternation particularly in the light of national sensitivity about foreign policy. The Czech Constitutional Court considered it the most problematic of all the Treaty provisions as it seemed to allow the Union powers to act in very ill-defined circumstances".

[149] Cremona, note 101, at 55.

[150] Cremona, note 101, at 57.

[151] Cremona, note 101, at 56.

of areas of exclusive, shared and supporting competence for the first time within the Treaties constitutes significant progress in the clear delimitation of competences.

In the case of areas falling with the EU's exclusive competence, Member States can no longer, as a matter of EU law, act independently of the EU, for example, by concluding international agreements or by affecting the EU's exercise of its exclusive competence.[152] There are two elements to the identification of exclusive competence within the TFEU. In the first instance, Article 3.1 TFEU sets out those areas which fall within the EU's exclusive competence, most of which have a certain external dimension. They are: (a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; and (e) common commercial policy. Thus, for example, the common commercial policy – including elements thereof in which competence was previously shared between Union and Member States (such as trade in services and trade-related aspects of intellectual property) as well as entirely new aspects such as foreign direct investment – now falls entirely within the competence of the Union.

In a second step, Article 3.2 TFEU deals specifically with the Union's exclusive competence in treaty-making, stating that it enjoys such competence in three cases: first, when the conclusion of an international agreeement "is provided for in a legislative act of the Union"; secondly, when it "is necessary to enable the Union to exercise its internal competence"; and thirdly, "in so far as its conclusion may affect common rules or alter their scope". This has been described "an attempted synthesis of the case law of the ECJ on exclusive implied external competence", which "not only ... fail[s] to distinguish between a priori exclusivity and pre-emptive exclusivity (or pre-emption) [but] also conflates the separate

[152] An important feature of the Court of Justice's jurisprudence in the field of the external relations was its recognition of the exclusivity of the Community's (and now the Union's) competence in certain circumstances. Often entangled with issues as to the existence of competence, this aspect of its jurisprudence is also marked by a high degree of complexity and indeed confusion. In short, the Court recognised the Community's external competence as being exclusive in a number of different circumstances. One recent analysis has identified four categories of exclusive external competence in the case-law: first, where the Treaty itself grants exclusive competence (*a priori* exclusivity); secondly, where exclusivity arises out of the exercise of internal competence (so-called *ERTA* exclusivity); thirdly, where exclusivity arises out of internal legislative acts; fourthly, where exclusivity arises out of the fact that the internal and external aspects of the policy in question can only be exercised effectively together. See De Baere, note 101, at 39-61.

questions of the existence of implied external competence and the exclusivity of that competence".[153]

In many other areas, the competence of the Union is recognised as being shared with Member States. As Article 2 TFEU recognises, "when the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area". The interplay between the exercise of shared competence by the Union and by the Member States is then articulated. First, the Member States "shall exercise their competence to the extent that the Union has not exercised its competence". Secondly, the Member States "shall again exercise their competence to the extent that the Union has decided to cease exercising its competence".[154] Thus, the locus of external competence is not static and set for all time. Furthermore, it is within this sphere of non-exclusive competence that the principle of subsidiarity applies.[155]

Article 4.2 TFEU sets out a non-exhaustive list of the principal areas of such competence, which includes: (a) internal market; (b) social policy, for the aspects defined in this Treaty; (c) economic, social and territorial cohesion; (d) agriculture and fisheries, excluding the conservation of marine biological resources; (e) environment; (f) consumer protection; (g) transport; (h) trans-European networks; (i) energy; (j) area of freedom, security and justice; (k) common safety concerns in public health matters, for the aspects defined in this Treaty. There is a strong external dimension to many of these policies, such as environment, transport and energy. The shared nature of this competence is often reflected in the relevant provisions of the Treaty, where express reference is made to this external dimension.[156] Furthermore, perhaps as a response to the Court's case-law on pre-emption, whereby Union action in a field may preclude Member State action, the additional provisions of Article 4

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[153] Cremona, note 101, at 61. On its Relationship with 216(1), Cremona comments: "Although exclusive competence is necessary in some external policy situations, it does not need to be the norm". It has also been observed that this provision "is of little use in *ex ante* clarifying the extent of the Union's exclusive external competences, because the criteria listed appear to be liable to contestation and hence in need of further judicial clarification": De Baere, note 101, at 70 (footnotes omitted).

[154] As Protocol No. 25 on the exercise of shared competence makes clear, "when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area".

[155] In accordance with Article 5.2 TEU, in such areas, "the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

[156] For example, as already described, the Union's external competence in respect of the environment is specifically expressed to be "without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements": Article 191.4 TFEU.

TFEU adds a further gloss to the areas of shared competence. In the case of research, technological development and space,[157] and of development cooperation and humanitarian aid,[158] the exercise by the Union of its competence "shall not result in Member States being prevented from exercising theirs". Thus, the doctrine of pre-emption does not apply to these areas of competence.

In a number of areas, the Union's competence is of a supporting or supplementary character, the competence in these areas remaining with Member States. Article 6 provides for the Union "competence to carry out actions to support, coordinate or supplement the actions of the Member States" in the following areas: (a) protection and improvement of human health; (b) industry; (c) culture; (d) tourism; (e) education, vocational training, youth and sport; (f) civil protection; (g) administrative cooperation. This is reflected in the external dimension of the relevant provisions of the TFEU which, as set out above, speak, in rather vague terms, of fostering cooperation with third countries and international organisations.

To conclude, the competence of the European Union in the external sphere, as in the internal sphere, may be exclusive, shared or supporting. While the rules governing the extent of such competence remain complex, notwithstanding certain clarifications brought by the TFEU, across all areas of competence, the relationship between Union and Member States is close and crucially important for the effective exercise of this competence. Moreover, this relationship is also evident, if more obliquely, in the interplay between the competences under the TFEU and those under the TEU in the field of international relations.

D. The Common Foreign and Security Policy

Cooperation among Member States in the field of foreign policy has a long and chequered history, taking place initially outside the Treaties "as a purely intergovernmental process", the purpose of which was "to enhance the influence of the Member States on the international stage".[159] First given a footing in the Treaties through Title III of the Single European Act, this co-operation has been conducted, since the Maastricht Treaty, through the Common Foreign and Security Policy (CFSP). The CFSP is now defined in Chapter 2 of the Title V of the TEU. The first paragraph of Article 24.1 sets out the scope of the EU's competence in this field:

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[157] Article 4.3 TFEU.
[158] Article 4.4 TFEU.
[159] MacLeod, Hendry and Hyett, note 101, at 412.

> The Union's competence in matters of common foreign and security policy shall cover *all* areas of foreign policy and *all* questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence.[160]

On its face, therefore, the CFSP encompasses all areas of foreign policy. While, as Eeckhout has observed, "the sphere of action of the CFSP is defined in the broadest terms..." and "a lot of different activities are undertaken within the framework of this policy", "increasingly it appears that its specificity is concentrated in security and defence matters...".[161] Dashwood has argued that this formulation is "to be understood as confined to 'foreign policy' in the narrow sense....namely, the political, security and defence aspects of international relations".[162]

The special character of the CFSP, which distinguishes this policy from other areas of the EU's external action, is emphasised in the second paragraph of Article 24.1.

First, "the common foreign and security policy is subject to specific rules and procedures", emphasising its specificity vis-à-vis the external action governed by the TFEU. The full force and effect of supranationalism which is evident in that sphere is absent from the CFSP, which is characterised by an emphasis on intergovernmentalism.

Secondly, it "shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise". Thus unanimity is the general rule, reflecting this intergovernmental approach to policy-making.[163]

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[160] Emphasis added.

[161] Eeckhout, note 101, at 164: "its vocation to cover all areas of foreign and security policy is thus much qualified: there should be a footnote stating that this provisions applies only in so far as there is no EC competence".

[162] Dashwood, "Article 47 TEU and the Relationship between First and Second Pillar Competences" in Dashwood and Maresceau eds, note 101, at 101.

[163] While unanimity is the general rule, Article 31(2) provides for derogation and the use of a qualified majority voting in the Council in the following circumstances: when adopting a decision defining a Union action or position on the basis of a decision of the European Council relating to the Union's strategic interests and objectives, as referred to in Article 22(1); when adopting a decision defining a Union action or position, on a proposal which the High Representative of the Union for Foreign Affairs and Security Policy has presented following a specific request from the European Council, made on its own initiative or that of the High Representative; when adopting any decision implementing a decision defining a Union action or position; when appointing a special representative in accordance with Article 33. If a member of the Council declares that, for vital and stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by qualified majority, a vote shall not be taken. The High Representative will, in close consultation with the Member State involved, search for a solution acceptable to it. If s/he does not succeed, the Council may, acting by a qualified majority, request that the matter be referred to the European Council for a decision by unanimity. Paragraph 3 provides that the European Council "may unanimously adopt a decision

Thirdly, the "adoption of legislative acts shall be excluded", the CFSP not being designed to give effect to measures of general application or lay down rules of law.

Fourthly, the CFSP "shall be put into effect by the High Representative of the Union for Foreign Affairs and Security Policy and by Member States, in accordance with the Treaties"[164]. Furthermore, "the specific role of the European Parliament and of the Commission in this area is defined by the Treaties".[165] Thus, while cooperation and coordination takes place at EU level, Member States, through the Council, which is the central actor in the CFSP, continue to enjoy considerable power and retain a large degree of independence of action, at least in principle.

Fifthly, the "Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union".[166] Although this represents an increased role for the Court of Justice under the Treaty of Lisbon, it nonetheless emphasises the strongly political nature of the CFSP.[167]

Having regard to these characteristics, it is unsurprising that it has been said, of the CFSP regime prior to Lisbon, that "the EU in the CFSP operates much more like an 'ordinary' international organization than under the EC Treaty".[168] While retaining much of its specificity under the Treaty of Lisbon, it remains to be seen to what extent this position might change over time, as the place of the CFSP within the

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stipulating that the Council shall act by a qualified majority in cases other than those referred to in paragraph 2". Paragraph 4 provides that the preceding two paragraphs "shall not apply to decisions having military or defence implications" and paragraph 5 provides that, for procedural questions, "the Council shall act by a majority of its members".

[164] The position of the High Representative, a modified version of the Union Minister for Foreign Affairs present in the Constitutional Treaty, is set out in Article 18 TEU. Paragraph 1 provides that "the European Council, acting by a qualified majority, with the agreement of the President of the Commission, shall appoint the High Representative of the Union for Foreign Affairs and Security Policy". Paragraph 2 declares that the "High Representative shall conduct the Union's common foreign and security policy" while paragraph 3 states that the "High Representative shall preside over the Foreign Affairs Council".

[165] Article 36 sets out the role of the Parliament which shall be consulted regularly by the High Representative and its views shall be duly taken into consideration. It can also be briefed by special representatives, may ask questions and make recommendations, and engages in a twice-yearly debate on the policy.

[166] Article 24.1 TEU.

[167] Denza suggested two reasons for the exclusion of jurisdiction when the CFSP was established: first the character of the instruments adopted within the CFSP; secondly, the record of the Court of Justice: Denza, *The Intergovernmental Pillars of the European Union* (Oxford University Press, 2002), at 311-312.

[168] De Baere, note 101, at 158.

the 'unified' European Union develops and the search for coherence in EU foreign policy intensifies.

The framework for the definition and implementation of the CFSP,[169] as well as the measures through which the Union conducts the CFSP,[170] are set out in some detail. Within those broad lines, the Council "shall frame the common foreign and security policy and take the decisions necessary for defining and implementing it" and the Council and the High Representative "shall ensure the unity, consistency and effectiveness of action by the Union". Significantly, and again highlighting the vertical division of power in this field, section 3 states that the CFSP "shall be put into effect by the High Representative and by the Member States, using national and Union resources", the modalities of which are detailed in Article 41 TEU.[171] The right of initiative in CFSP lies with any Member State and the High Representative whether acting independently or with the Commission's support.[172]

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[169] Article 24.2 TEU provides that, within the framework of its objectives and principles, "the Union shall conduct, define and implement a common foreign and security policy, based on the development of mutual political solidarity among Member States, the identification of questions of general interest and the achievement of an ever-increasing degree of convergence of Member States' actions". Article 24.3 TEU gives expression to the important duty of cooperation between the Union and Member States, laid down in Article 4.3 TEU, within the specific context of the CFSP: "[t]he Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area"; "the Member States shall work together to enhance and develop their mutual political solidarity" and "shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations". However the task of ensuring compliance with these obligations is political, entrusted to "[t]he Council and the High Representative".

[170] The measures through which the Union conducts the CFSP are set out in Article 25 TEU and consist of: (a) general guidelines; (b) decisions defining: (i) actions to be undertaken by the Union; (ii) positions to be taken by the Union; (iii) arrangements for the implementation of the decisions referred to in points (i) and (ii); and (c) systematic cooperation between Member States in the conduct of policy. While this marks a change in terminology, the substance of these measures remains much the same. While these decisions clearly bind Member States as a matter of international law by virtue of the provisions of the TEU, their "precise legal effects are uncertain": See Eeckhout, note 101, at 420. In particular, in contrast to decisions adopted under the TFEU, the application of the doctrines of supremacy and direct effect to CFSP decisions is controversial and problematic: See De Baere, note 101, at 201-209. See also Wessel, "The EU as a party to international agreements: shared competences? Mixed responsibilities?" in Dashwood and Maresceau eds, note 101, at 145. The measures adopted within the scope of the CFSP may encompass operational action as envisaged by Article 28. In this context, see also Article 26.

[171] The role of the High Representative, who, in accordance with Article 18 TEU represents the Union within the sphere of CFSP and who is assisted by a European External Action Service, is elaborated upon in Article 27 TEU. Since the appointment of Catherine Ashton as High Representative in 2009, there has been much comment and controversy in respect of this new role, the impact of which will only become clear over time. See e.g. Beesley, 'MEPs question incoming foreign policy chief' *Irish Times*, 12th January 2010; Traynor, 'Lady Ashton endures baptism of fire as Europe's first foreign policy chief' *The Guardian*, 1st March 2010.

[172] Article 30 TEU.

Individual Member State action is inhibited in a number of respects.[173] Article 31, while reiterating the general rule of unanimity and the exclusion of legislative acts,[174] also makes clear the effect of the duty of cooperation:

> ...In a spirit of mutual solidarity, the Member State concerned shall refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position.[175]

This is further emphasised in Article 32 TEU.[176] Thus, while the freedom of action of the Member States within the context of CFSP is considerable, it must nevertheless be exercised in accordance with the duties of cooperation and solidarity which underpin all aspects of the Union's action, and particularly its external action.

While the general principles of the Common Foreign and Security Policy in the new Treaties closely reflect those of the old, significant change is evident in the Common Security and Defence Policy (CSDP), the common defence now being considered a real objective rather than a distant eventuality, although the position of traditionally neutral Member States such as Ireland will undoubtedly continue to present challenges in this respect. Section 2 of Chapter 2 TEU concerns the CSDP which, according to Article 42 TEU, "shall be an integral part of the common foreign and security policy" and "shall provide the Union with an operational capacity drawing on civilian and military assets", which may be used "on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter", the performance of such tasks being undertaken "using capabilities provided by the Member States".[177]

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[173] For example, under Article 28(3) requiring prior consultation in relation to any national position or action adopted pursuant to a CFSP decision, although Article 28(4) recognises that, in exceptional circumstances, "Member States may take the necessary measures as a matter of urgency having regard to the general objectives of that decision", which measures are to be informed immediately to the Council. Further constraints are placed on Member States' freedom of action: for example, Article 29, which allows for the Council to adopt decisions defining the EU approach to a particular matter of a geographical or thematic nature, provides "Member States shall ensure that their national policies conform to the Union positions".

[174] It begins: "When abstaining in a vote, any member of the Council may qualify its abstention by making a formal declaration under the present subparagraph. In that case, it shall not be obliged to apply the decision, but shall accept that the decision commits the Union".

[175] It continues: "If the members of the Council qualifying their abstention in this way represent at least one third of the Member States comprising at least one third of the population of the Union, the decision shall not be adopted".

[176] Member States shall consult one another within the European Council and the Council on any matter of foreign and security policy of general interest in order to determine a common approach. Before undertaking any action on the international scene or entering into any commitment which could affect the Union's interests, each Member State shall consult the others within the European Council or the Council. Member States shall ensure, through the convergence of their actions, that the Union is able to assert its interests and values on the international scene. Member States shall show mutual solidarity.

[177] These tasks are defined in more detail in Article 43 TEU.

Article 42.2 TEU specifies that the CSDP "shall include the progressive framing of a common Union defence policy" which "will lead to a common defence, when the European Council, acting unanimously, so decides".[178] The Council "shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements". However, the importance of unanimity in this context is clear, particularly in light of the following paragraph which expresses a qualification of relevance to Member States such as Ireland: "[t]he policy of the Union in accordance with this Section shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework".[179] Within the CSDP,[180] therefore, there remains a significant tension between those Member States which are also members of NATO and those, such as Ireland, which remain outside that framework and adopt a policy of military neutrality.

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While some have criticised the "precarious state" of this policy and argued that "the often lofty ideals and objectives of CFSP need to be matched with strong constitutionalism",[181] others have identified a momentum therein, in particular in the area of security and defence policy.[182] It is too early yet to identify the contribution of the reforms introduced by the Treaty of Lisbon, such as the new High Representative. However, even a brief overview of the provisions of the CFSP, such

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[178] Article 29.4.9° of the 1937 Constitution states that the State shall not adoption such a decision where that common defence would include the State.

[179] Section 3 of Article 42 TEU provides that Member States "shall make civilian and military capabilities available to the Union for the implementation of the common security and defence policy" and "shall undertake progressively to improve their military capabilities", the European Defence Agency, which had already been established by joint action 2004/551/CFSP of 12th July 2004, being charged with assisting the Council in this regard.[179] Section 4 provides for unanimous decision-making in this context. Section 5 provides for the entrusting of tasks under CSDP to groups of Member States while section 6 for permanent structured cooperation within the Union framework, which is defined more thoroughly in Article 46.

[180] It should also be noted that, for the first time in the current Treaties, a mutual defence clause now also forms part of the CSDP. Section 7 provides that "[if] a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter" although this "shall not prejudice the specific character of the security and defence policy of certain Member States". Furthermore, "commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation".

[181] Eeckhout, note 101, at 420.

[182] Koutrakos, note 101, at 413.

has been conducted here, demonstrates the ambitious nature, and profound influence, of the foreign policy cooperation among Member States within the European Union on the legal framework of Member States' international relations. As Laffan and O'Mahony suggest in their review of Irish foreign policy in the EU, "the evolution of the EU's foreign and security policy capacity has significantly broadened the context and content of Irish foreign policy": "Active participation in the EU's CFSP may indeed have reduced Ireland's autonomy in foreign policy, but this has occurred in exchange for increased prestige and weight for a small, peripheral state at the edge of Europe".[183] As they conclude, "that the EU's CFSP (together with its new ESDP) forms the overarching framework of Ireland's foreign policy is without doubt". While the influence of the CFSP has therefore been acknowledged by political scientists in Ireland, there has been no consideration of its effect from a legal perspective. However, as this section makes clear, the CFSP, notwithstanding its largely political and intergovernmental character, also enjoys an important place in the legal framework of Ireland's international relations.

Before concluding, it is appropriate to deal with this interplay between the TFEU and the TEU, as it is envisaged in the Treaties. It is also necessary to look briefly at the phenomenon of "mixity" or joint participation of Union and Member State in international activity, where the close relationship between the Union and Member States is particularly evident.

E. Interaction between the External Powers under the TEU and the TFEU

As emphasised at the outset, a constant theme of the EU's international relations, particularly in recent times, has been coherence and coordination with a view to making the EU a more effective, and influential, international actor. In addition to the broad provisions for political coordination, the interaction between the diverse range of powers of the EU in the context of the CFSP, on the one hand, and in the context of the policies coming within the TFEU, on the other, is governed by a number of specific provisions.[184] Most significantly, the interaction is governed by

[183] Laffan and O'Mahony, *Ireland and the European Union* (Palgrave Macmillan, 2008) at 195. See also Tonra, *Global Citizen And European Republic: Irish Foreign Policy In Transition* (Manchester University Press, 2006).

[184] The imposition of sanctions is one important area of interaction. As outlined above, in order to adopt "restrictive measures" in accordance with Article 215 TFEU, there must first be a decision adopted within the context of the CFSP.

Article 40 TEU which provides that the implementation of the CFSP "shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union" and *vice versa*.[185] Thus while the Treaties have removed the pillar structure which formerly divided these distinct fields of competence and created a single European Union, this new provision continues to draw a clear line between action under the CFSP and action, including external action, under the TFEU, which, as already seen, operate according to different procedures. In contrast to its predecessor which was interpreted as protecting EC competence from being "encroached upon", Article 40 TEU "makes clear that CFSP competences and the Union's other competences are to be equally protected against each other".[186] According to Dashwood, "under the new dispensation, the only viable approach will be for the competent institutions to determine where, all things considered, the centre of gravity of a given measure lies" in order to determine the appropriate legal basis under the Treaties.[187] Moreover, this analysis must now took place within the context of common objectives across all areas of the EU's external action, as reflected in Article 21 TEU. Dashwood therefore queries whether we must anticipate "a continuation, even an exacerbation, of the debilitating turf wars between the Commission and the European Parliament, on the one side, and the Council and the Member States, on the other, which have bedevilled the Union's external activity in recent years".[188] As with so much else in the revised Treaties, only time will tell.

F. Mixity as a Feature of the European Union's International Relations

The complex division of power between the Union and Member States in the Treaties, and the difficulties to which this has given rise in the practice of the EU's international relations, have led to the development of "mixed agreements", whereby

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[185] Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.

[186] Dashwood, "Article 47 TEU and the relationship between first and second pillar competences" in Dashwood and Maresceau eds, note 101, at 100. In relation to the 'old regime', see Case C-91/05 *Commission v. Council (ECOWAS)* [2008] ECR I-3651.

[187] Dashwood, note 180, at 101.

[188] Dashwood, note 180, at 103.

both the Union (or previously the Community) and some or all of the Member States are both parties to an international agreement. Moreover, in many international fora, the Union and Member States must coordinate their joint participation, another example of "mixity".

Far from being a rare occurrence, "more often than not, international agreements are concluded by the Community and its Member States acting jointly, rather than the Community simply acting on its own".[189] While this is understandable within fields in which competence is shared between Union and Member States, the reach of mixity has been much greater. It has variously been described as a "hallmark of the Community's external relations"[190] and "part of the daily life of the external relations of the European Union".[191] Rosas has proposed a typology of mixed agreements, distinguishing, for example, between situations of shared competence and parallel competence (the latter case involving joint participation not involving any effect on the rights of the Union and Member States *inter se*), between situations of coexistent competence and concurrent competence (referring to the extent to which it is possible to separate and allocate particular obligations under an agreement to the Union or Member States respectively, the former being situations where it is possible to do so, the latter being situations where no such separation can meaningfully be drawn) as well as between obligatory and facultative mixity and mixity within bilateral and multilateral contexts.

Within this short overview, it is impossible to delve into the detail of the many different forms of mixity;[192] what is important to note is its prevalence and its importance as a method of regulating international relations within the EU. De Baere has aptly commented that "many of the constitutional turf wars within the Community are solved by resorting to mixity, making it arguably into a more prominent feature of the Community's constitutional structure than exclusivity".[193] Nevertheless, mixity nowhere features within the text of the Treaties.

Joint participation of the Union and Member States in international agreements, or indeed within international organisations, raises manifold issues on

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[189] Eeckhout, note 101, at 190.
[190] *Ibid.*
[191] Rosas, "The European Union and Mixed Agreements" in Dashwood and Hillion eds, note 101, at 200.
[192] For detailed studies, see Hillion and Koutrakos eds, *Mixed Agreements Revisited: the EU and its Member States in the World* (Hart Publishing, 2010) and Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (Springer, 2001). For a classic but now dated collection of essays on the topic, see O'Keeffe and Schermers eds, *Mixed Agreements* (Kluwer, 1983).
[193] De Baere, note 101, at 232.

the faultlines between international law, European Union law and the law of Member States. In respect of international agreements, for instance, coordinating the positions of both Union and Member States is complex at all stages of the process, from negotiation through conclusion to implementation, not to mention the international responsibility of these parties in the case of any breach on the part of one or the other.

The overarching principle through which the Court, in its jurisprudence, has sought to deal with these complex issues is that of the duty of cooperation, now embodied in Article 4.3 TEU. This was emphasised in the recent case of *Commission v. Ireland* relating to Ireland's reference of its dispute with the United Kingdom in respect of the MOX Plant at Sellafield to an arbitral tribunal established under Annex VII of the United Nations Convention on the Law of the Sea, which had been concluded by both the Member States and the European Community (as it then was), along with a declaration in respect of their respective spheres of competence. First, the Court reiterated its case-law on the duty of cooperation which, as a general matter, requires "Member States to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty"[194] and gives rise to "obligation of close cooperation in fulfilling the commitments undertaken by them under joint competence when they conclude a mixed agreement".[195] The Court then turned to the application of this principle to the dispute at hand:

> That is in particular the position in the case of a dispute which, as in the present case, relates essentially to undertakings resulting from a mixed agreement which relates to an area, namely the protection and preservation of the marine environment, in which the respective areas of competence of the Community and the Member States are liable to be closely interrelated, as is, moreover, evidenced by the Declaration of Community competence and the appendix thereto.
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> The act of submitting a dispute of this nature to a judicial forum such as the Arbitral Tribunal involves the risk that a judicial forum other than the Court will rule on the scope of obligations imposed on the Member States pursuant to Community law.[196]

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[194] C-459/03 *Commission v. Ireland*, [2006] ECR I-4635, at para. 174.
[195] *Ibid.*, at para.175.
[196] *Ibid.*, at paras.176-177.

Having referred to correspondence between the parties in respect of the submission of the dispute to another international arbitral tribunal wherein the Commission had taken a view as to its exclusive competence in respect of this sphere, the Court declared that "the obligation of close cooperation within the framework of a mixed agreement involved, on the part of Ireland, a duty to inform and consult the competent Community institutions prior to instituting dispute-settlement proceedings concerning the MOX plant within the framework of the Convention".[197] Upholding the complaint, the Court concluded, "it is common ground that, at the date on which those proceedings were brought, Ireland had not complied with that duty of prior information and consultation".[198]

Views on mixity are, perhaps appropriately, mixed: many, such as Eeckhout, have criticised it as "making the EU a more cumbersome and inflexible international actor, difficult to negotiate with and slow to ratify agreements" and giving rise to "most intricate questions concerning jurisdiction to interpret and legal effects"[199]; others, such as Weiler, see it as "the best compromise between the Community exclusivity and no action at all" and a "near-unique contribution to true federalism" within the EU.[200] Regardless of its utility, mixity has been, and remains, an important feature of the complex legal framework governing the European Union's international relations. Its implications for the implementation of international agreements will be explored in Chapter 3.

IV. CONCLUSION

This chapter has sought to provide an overview of the changing legal framework within which Ireland's international relations take place. While the structure laid down in Article 29 of the 1937 Constitution remains important for those areas over which Ireland retains competence in international relations, such areas are increasingly affected by the rules laid down in the European Treaties. First, the external action provisions of the TFEU cover many of the most important fields in contemporary international relations and, in some areas, the EU now enjoys exclusive competence. Secondly, with the emergence of the CFSP, it is fair to say,

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[197] *Ibid.*, at para.180.
[198] *Ibid.*, at para.181.
[199] Eeckhout, note 101, at 224.
[200] Weiler, "The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle" in Weiler, *The Constitution of Europe: Do the New Clothes Have an Emperor?* (Cambridge University Press, 1999), at 130.

as Eeckhout has, that there "appear to be virtually no significant areas of international law making in which the EU cannot participate".[201]

The legal framework governing international relations within the European Union is complex and dynamic, reflecting the unique nature of the relationship between the EU and Member States.[202] Notwithstanding the clarifications brought by the Treaty of Lisbon, in many areas it remains extremely difficult to delineate clearly the limits of EU competence and, as the *MOX Plant* case showed, these issues are far from academic for Member States. In many cases, it is not simply a question of transferring power from Member States to the EU but rather of the EU and Member States' sharing such power, coordinating their external action and collectively seeking to become more effective players on the international stage. When the EU widens its international activity, it often does so acting through or alongside Member States, not to their exclusion.

In short, it is now impossible to understand the legal framework governing Ireland's international relations without understanding the significant EU dimension of this framework. As the EU's role in international relations has increased, and it has become bound by a wide range of international obligations, its role in the implementation of those obligations has correspondingly increased. The following chapters explore the implications of this changing legal framework on the implementation of international law within the Irish legal system.

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[201] Eeckhout, note 101, at 165.

[202] For an argument that there are too many rules governing the conduct of foreign affairs in the EU, see de Witte, "Too Much Constitutional Law in the European Union's Foreign Relations?" in Cremona and de Witte eds, *EU Foreign Relations Law – Constitutional Fundamentals* (Hart Publishing, 2008), at 3-15.

CHAPTER 3.

IMPLEMENTATION OF INTERNATIONAL AGREEMENTS IN THE IRISH LEGAL SYSTEM

I. INTRODUCTION

International agreements, or treaties, are the most important source of modern international law.[1] They are also, directly and indirectly, an important source of law in the Irish and European Union legal systems. Indeed treaties have played a significant role in the very shaping of these legal systems: from "the Treaty" of 1921 which marked the foundation of Irish independence,[2] to the founding Treaties upon which the European Union (EU) is based and which form an integral part of Member States', including Ireland's, constitutional frameworks. However, the importance of international agreements is not confined to matters of high politics. The past century has witnessed an unprecedented rise in treaty-making by States and international organisations, such as the EU, in a diverse range of fields – from trade, transport, and telecommunications, to education, extradition, and the environment, to name but a few – which have far-reaching effects within their internal legal systems. This chapter explores how international agreements are given effect within the Irish legal system.

In Section II, by way of background and in order to better understand the process of implementation within internal legal systems, the concept of "international agreement" and the connection between the internal and international aspects of the process of treaty-making are briefly examined.

Section III of the chapter focuses on the approach to implementation of international agreements which is adopted within the Irish legal system independently of the EU. While there has been considerable study of the

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[1] While volume alone is not always an indicator of importance, a striking illustration of this importance is the number of international agreements registered with the Secretariat of the United Nations in accordance with Article 102 of the United Nations Charter. According to Aust, writing in 2007, "over 50,000 treaties have now been registered by the United Nations", of which 14,600 were submitted by international organizations: see Aust, *Modern Treaty Law and Practice* (2nd ed., Cambridge University Press, 2007), at 340.

[2] Articles of Agreement for a Treaty between Great Britain and Ireland (signed 6 December 1921) 27 LNTS 449. The very character of these Articles as an international agreement was vigorously affirmed by the new Irish Free State, notwithstanding British protests, through its registration at the League of Nations in accordance with Article 18 of the Covenant. For an account of this controversy, see Harkness, *The Restless Dominion* (New York University Press 1969), at 57-63. See also McNair, *The Law of Treaties* (Oxford University Press 1961), at 182.

implementation of specific agreements, most notably the European Convention on Human Rights (ECHR),[3] there has been surprisingly little consideration of the general phenomenon of treaty implementation within the Irish legal system.[4] As encapsulated in Article 29.6 of the Constitution of Ireland, 1937 (the 1937 Constitution), this approach is dualist: international agreements do not form part of Irish law automatically upon the State giving its consent to be bound but instead require positive legislative action in order to take effect within the Irish legal system.

The increasing powers of the European Union in international relations have resulted in an expansion of its role in the making and implementation of international agreements. Thus, in order to understand fully the effect of international agreements within the legal systems of Member States, such as Ireland, it is necessary to understand their effect within the legal system of the EU. To this end, Section IV examines the approach adopted within the the EU legal system. This approach, which has often been classified as monist,[5] stands in contrast to the approach adopted within the Irish legal system.

In Section V, which concludes the chapter, it will be argued – on the basis of the exposition of the law governing the implementation of international agreements in Sections III and IV – that it is no longer possible to consider the process of implementation of international agreements within the Irish legal system without having regard to the significant role of the EU in that process and to the changing framework for implementation which this creates. While the different approaches adopted in the Irish and European Union legal systems may be presented, simplistically, as a clash between dualism and monism, it is argued that the difficult issues, both of principle and in practice, to which the implementation of international agreements give rise go beyond the basic mode of implementation. The labels of monism and dualism belie the complexity of this process in all legal systems and especially the evolving, interconnected legal systems of the European Union and its Member States.

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[3] See especially Heffernan ed, *Human Rights: A European Perspective* (Round Hall/ICEL, 1994), Kilkelly ed, *ECHR and Irish Law* (2nd ed, Jordan, 2009) and de Londras and Kelly, *The European Convention on Human Rights Act: Operation, Impact and Analysis* (Thomson Round Hall, 2010).

[4] The most comprehensive examinations of the general position are in Fitzsimons, *Les traités dans la constitution et pratique irlandaises* (Doctoral thesis, University of Paris II, 1987), at 153-194, and the Irish report by Symmons in Eisemann ed, *L'intégration du droit international et communautaire dans l'ordre juridique national* (Kluwer, 1996), at 330-342. Other apparently general items in the literature, such as Lysaght, "The Status of International Agreements in Irish Domestic Law" (1994) 12 *ILT* 171, take a more selective approach to the topic.

[5] See e.g. Lenaerts and Van Nuffel, *Constitutional Law of the European Union* (Sweet & Maxwell, 1999), at 551.

II. INTERNATIONAL AGREEMENTS

The international agreements to which Ireland and the European Union are parties reflect the range and diversity of their international relations. Some agreements are bilateral, between Ireland and/or the European Union, on the one hand, and another State or international organisation, on the other.[6] Others are multilateral, bringing together a larger number of parties, whether regional in scope (for instance, the agreements concluded within the Council of Europe) or universal in scope (for example, many of agreements concluded under the auspices of the United Nations which are open to all (or almost all) members of the international community). Taken together, these agreements create a rich web of relationships between Ireland and the Eurpean Union and the vast majority of States and international organisations active in international relations. EU membership has significantly expanded this web of relationships, particularly for smaller Member States such as Ireland.

As the agreements referred to in this Chapter will show, the range of subject-matter covered by international agreements is extensive.[7] The nature of the obligations imposed by international agreements is as diverse as their subject-matter.[8] In terminology too, there is great diversity.[9] As Cassese remarks, "the terminology varies but the substance is the same: they all denote a merger of the

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[6] While the term 'bilateral' "describes a treaty between two states", it is also used "where two or more states form one party, and another state or states the other party": see Aust, note 1, at 10. In the EU practice, association and cooperation agreements, as well as those with, for example, the ACP States, have a strong bilateral dimension.

[7] In addition to agreements which have gained great prominence within the political and legal systems – such as the European Treaties themselves, the United Nations Charter, the Good Friday Agreement, the European Convention on Human Rights or the Kyoto Protocol – there are significant numbers of agreements regulating much more low-key or mundane matters, such as the postal system, the carriage of goods by road, and cross-border aspects of taxation, social security and succession.

[8] They may, for example, provide for inter-State cooperation on an issue of mutual concern, allow access to the markets of another State, criminalise certain conduct and require its punishment, impose financial obligations on the State, or establish an international organisation. In this regard, see Keith, "The Role of International Law in National Law", United Nations Audiovisual Library in International Law (available online http://untreaty.un.org/cod/avl/pdf/ls/Keith_outline.pdf last accessed 21 August 2010), where the "varying characteristics of rules of international law" are set out, with examples, by reference to their different functions, different subject matters, different relationships, whether or not they are capable of direct judicial enforcement (e.g. laws empowering state action, of a programmatic character, procedural obligations, 'pious declarations', rights and duties in a precise form capable of direct application without further legislative elaboration).

[9] In addition to international agreements and treaties, the Irish Treaty Series includes conventions, charters, covenants, statutes, acts, accords, protocols and so on. Article 38.1 of the Statute of the International Court of Justice – widely regarded as the classic statement of the sources of international law – refers, in sub-paragraph (a), to "international conventions, whether general or particular, establishing rules expressly recognised by the contracting parties". The Vienna Convention on the Law of Treaties (adopted on 22 May 1969 and entered into force 27 January 1980)(hereinafter the Vienna Convention or VCLT), the fundamental text in this area, is on the law of "treaties".

wills of two or more international subjects for the purpose of regulating their interests by international rules".[10] Article 29 of the 1937 Constitution speaks of 'international agreements'.[11] Although the governing instruments of the European Union are the Treaty on the European Union and the Treaty on the Functioning of the European Union respectively, these Treaties also refer to the conclusion by the Union of 'international agreements'.[12] It is for this reason that the term 'international agreements' is generally used in this chapter.

Notwithstanding the great variety in the structure, content and nomenclature of international agreements, there are certain essential features which all international agreements share. Although the terms are not necessarily co-extensive – 'international agreement' being broader than 'treaty'[13] – the definition of 'treaty' in the Vienna Convention provides a useful starting point in understanding the general concept. Article 2 of the Convention defines a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation". Dividing this definition into its composite parts, the scope of the concept becomes clearer. First, in order to constitute an international agreement, the parties must be "States" under the Vienna Convention of 1969 (or "international organisations" under its 1986 counterpart).[14] In other words, the

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[10] Cassese, *International Law* (2nd ed., Oxford University Press, 2005), at 170.

[11] Article 29.5.1°, Article 29.5.2° and Article 29.6. Article 29.5.3° speaks of "agreements or conventions of a technical and adminstrative character".

[12] Article 216 TFEU. Verwey comments, "The reason for this use (international agreement) is that the word 'treaty' is used when reference is made to the Treaty establishing the European Communities, the Treaty establishing the European Atomic Energy Community and the Treaty on European Union. Even so, it is common practice to designate treaties concluded by international organizations as agreement": Verwey, *The European Community, the European Union and the International Law of Treaties* (TMC Asser Press, 2004), at 91.

[13] As Article 3 of the Vienna Convention makes clear, the definition of 'treaty' therein is restrictive, excluding from its ambit other international agreements "concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form". However, this does not affect: (a) the legal force of such agreements; (b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention; (c) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties. Thus, while the Vienna Convention is the authoritative statement on the law of treaties, a limited class of treaties falls within its scope strictly speaking and it is not, by its own account, exhaustive. See, for example, Verwey who has referred to the "very narrow definition of the two Vienna Conventions": see Verwey, note 12, at 90.

[14] Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations, 1986 (not yet in force). On the 1986 Convention, Hoffmeister notes: "It is true that the Community has not so far decided to ratify the 1986 Convention ....However, the reason for the abstention was not a general position against international treaty law as such, but an assessment that the specific Convention rules do not fit the Community structure. For that reason the Community rather refers to the 1969 Convention although it is not formally bound by it either. However, as the Convention codifies a number of customary international law rules, there is

parties must be "international persons", that is, entities enjoying international legal personality.[15] Secondly, and crucially, the essence of an international agreement is that it is governed by international law.[16] While name and form may help to indicate the nature of an instrument, it is the intentions of the parties which are ultimately determinative of the matter.[17] The memorandum of understanding (MoU) is a good example of the difficulties that can arise in this regard.[18] Thirdly, the form of an

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no practical difference.": Hoffmeister, "The Contribution of EU Practice to International Law" in Cremona (ed), *Developments in EU External Relations Law* (Oxford, 2008), at 57.

[15] In most cases, there will be little difficulty in determining the capacity of a party to conclude an international agreement. While the vast majority are concluded directly between Governments of States, others are concluded with emanations of the State e.g. agreements between individual parts of government, such as the agreements between the Departments of Defence of the US and Ireland on defence-related matters such as the 2004 Acquisition and Cross-Servicing Agreement (Irish Treaty Series, Miscellaneous/2006) or with sub-units of federal states e.g. the agreement on social security with Quebec (Irish Treaty Series, No. 20/1994). The situation is more complicated with respect to other non-State actors and, where the participation and representation of such actors is necessary, although they may not formally be a party to the international agreement, they may be associated with it in a number of ways: the most striking example of this is in the case of the Good Friday Agreement or Belfast Agreement of 1998 which is composed of the British-Irish Agreement between the two governments and the Multi-Party Agreement between the governments and the main political parties in Northern Ireland: see e.g. Morgan, *The Belfast Agreement: A Practical Legal Analysis* (Belfast Press, 2000), at paras. 1.23-1.37. In the context of EU practice, the European Community concluded the 1997 Euro-Mediterranean Interim Association Agreement on trade and cooperation with the "the Palestine Liberation Organisation (PLO) for the benefit of the Palestinian Authority of the West Bank and Gaza Strip" and has concluded agreements with Hong Kong as the Special Administrative Region of the People's Republic of China: see Hoffmeister, note 14, at 58.

[16] However, the fact that an instrument is governed by international law does not necessarily make it a treaty e.g. contracts between States and international corporations stipulating that they are to be governed by international law: see Aust, note 1, at 15.

[17] The dividing line between international agreements and mere declarations of policy can often be difficult to draw. Political communications between or joint declarations by States - even with respect to highly sensitive matters – may in certain circumstances constitute a binding international agreement where the parties are deemed so to intend. In this regard it is interesting to compare the decision in *Boland v. Ireland* [1974] IR 338 with that of the International Court of Justice in *Qatar-Bahrain* case (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, 1994 *ICJ Reports* 112). In *Boland*, the Supreme Court found, upon examination of the substance of the agreed communiqué between the British and Irish governments issued at Sunningdale, that it was merely a declaration of policy and did not constitute a legally binding international agreement. In the *Qatar-Bahrain* case, the International Court was confronted with a similarly entitled instrument – a joint communiqué between the Ministers of Foreign Affairs of the two States – and concluded that it did in fact constitute a binding agreement between the States under international law. In that case, the agreement was made in circumstances less solemn than those at Sunningdale yet, determining the intentions of the parties objectively from the words used in the document, the Court found that it was the intention of the parties to conclude a binding international agreement. Other instruments used by States may give rise to similar difficulties: for example, in certain examples of 'soft law' (on which see generally Chapter 6), as Aust remarks, "their makers recognise [they] are not treaties, even if they employ imperative language such as 'shall', but have as their purpose the promulgation of norms (albeit not legally binding) of general or universal application": Aust, note 1, at 53.

[18] Aust, note 1, at 18, emphasising their widespread use in most areas of international relations, states: "Such instruments have been variously described as 'gentlemen's agreements', 'non-binding agreements', '*de facto* agreements' and 'non-legal agreements'...[They] are most commonly referred to by the initials 'MOU'.... However, ..., calling an instrument a 'Memorandum of Understanding' does not, in itself, determine its status since – and most confusingly – some treaties are also given that name". In the Irish context, a number of Memoranda of Understanding are listed in the official Treaty Series which would appear to indicate that they are regarded as legally binding by the State (e.g. Memorandum of Understanding for a Framework of Co-operation between the Government of the State of Israel and the Government of Ireland in the field of Industrial Scientific Research and

agreement may be important in determining its status and effect.[19] Fourthly and finally, with regard to the "designation" of an instrument, although not determinative of its legal status, it may be indicative of the parties' intentions as to its status or effect. However, the Irish and EU courts have, in line with the international position, acknowledged the importance of looking beyond name to substance.[20]

As evidenced by the practice of Dáil Eireann and the Department of Foreign Affairs, Ireland adopts a broad notion of "international agreement". Ireland's international agreements are published in the Irish Treaty Series.[21] In accordance

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Technological Development (Irish Treaty Series No. 67/2007). Others have been presented to Dáil Eireann for its approval in accordance with Article 29.5: see e.g. the Motion of Approval in relation to the memorandum of understanding (MOU) with Austria, which relates to a weapons systems certification testing programme for Pilatus training aircraft for the Irish Air Corps (585 Dáil Debates 22, 6 May, 2004). In an EU context, Hoffmeister has observed that "international agreements are concluded by the Council, whereas the signing of administrative agreements or non-legally binding Memoranda of Understanding may fall within the power of the Commission": see Hoffmeister, note 14, at 58.

[19] Although the Vienna Convention requires that treaties be in written form, this is without prejudice to the validity of other forms of treaty in international law. Other forms of agreements, such as oral agreements, are "extremely rare": see Aust, note 1, at 9. From an Irish constitutional perspective, any "international agreement" would have to be reduced to writing so that it could have, in the case of agreements involving a charge upon public funds, its terms approved by or, in the case of other agreements, be laid before the Dáil in accordance with the provisions of Article 29.5. Moreover, the official commitment by the Government to lay all international agreements before the Dáil, even those of a technical and administrative character, would appear to exclude the possibility of the State entering into an oral agreement of this kind. Electronic agreements, on the other hand, are likely to become more common in international relations; in contrast to oral agreements, they present fewer practical and evidentiary problems, being capable of reproduction in written form: an interesting forerunner of such an agreement, albeit not of binding effect, is the US-Ireland communiqué on electronic commerce, which was issued electronically by Taoiseach Bertie Ahern and President Bill Clinton on a State visit to Ireland in 1998: see Aust, note 1, at 19. In an EU context, Verwey comments, "the type of instrument, whether it in the form of a bilateral or multilateral agreement, or an exchange of letters, or a gentleman's agreement, is irrelevant", "what matters, is that it has to be an agreement between the Community or the Union and one or more subjects of international law, governed by international law and being legally binding on the parties concerned": Verwey, note 12, at 99-100.

[20] In *Boland v. An Taoiseach* [1974] IR 338, although the Supreme Court had regard to the communiqué's title in interpreting the instrument, it laid far more emphasis on its actual terms to determine its legal character and concluded that the clauses impugned as unconstitutional were in fact no more than statements or declarations of policy. In *Crotty v. An Taoiseach* [1987] IR 713, at 784, Henchy J. in the Supreme Court noted that "the Single European Act (SEA) is something of a misnomer, for it is a treaty rather than an instrument with the legislative connotations attaching to an Act". Furthermore, within the SEA itself, Griffin J. (at 789) remarked on how Title III thereof "was effectively a separate treaty between the twelve countries who are the Member States of the European Communities" which are "referred to throughout that Title as the High Contracting Parties, the designation usually applied to states in international treaties". In an EU context, see *Opinion 1/75 (Understanding on a Local Cost Standard)* [1975] ECR 1355 where the Court noted that "the formal designation of the agreement envisaged under international law is not of decisive importance in connexion with the admissibility of the request" and stated that Article 228(1) used the word 'agreement' "in a general sense to indicate any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation".

[21] According to the website of the Department of Foreign Affairs, "for the convenience of the public and for the purposes of assisting in the teaching, study, dissemination and wider appreciation of international law it has been the practice of the Minister for Foreign Affairs since 1930, with certain exceptions, to publish the international agreements to which the State becomes a party in the Irish Treaty Series which is available on this site": see http://www.dfa.ie/home/index.aspx?id=42915 (last

with Article 102(1) of the United Nations Charter, "[e]very treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it." Thus, the international agreements to which Ireland is a party must also be registered with the Secretariat and are published in the United Nations Treaty Series.[22]

In the case of the European Union, the European Court of Justice has also adopted a broad notion of the concept in its jurisprudence.[23] In *Opinion 1/75*, the Court described it as "any undertaking entered into by entities subject to international law which has binding force, whatever its designation".[24] Although framed in broader terms,[25] there is a clear overlap between this definition and that of the Vienna Conventions. International agreements, acts adopted by bodies created by international agreements, and notices in relation to the status of international agreements, are published in the Official Journal.[26]

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accessed 11th August 2010). According to a Ministerial statement to the Dáil, "Once an agreement is laid before the Dáil, it is immediately added to the Irish Treaty Series and the text is made freely available from the Department's website": 615 Dáil Debates 741 (22 February, 2006). It is only in recent years that a systematic approach has been adopted to the Treaty Series, *inter alia*, by the appointment of a designated treaty officer who was charged with "conducting a thorough review of all international agreements entered into by Ireland since 29 December 1937, the date of entry into force of the Constitution": 615 Dáil Debates 741 (22 February, 2006). According to Lysaght, writing in 1991, the then practice of the Department was not to publish "all agreements to which the State is party in the treaty series and …avoid the obligation of laying them before the Dáil by classifying them as technical and administrative": see Lysaght, note 4.

[22] The United Nations Treaty Series is now freely available and searchable online: see http://treaties.un.org (last accessed 11th August 2010).

[23] See Verwey, note 12, at 96-100.

[24] *Opinion 1/75 (Understanding on a Local Cost Standard)* [1975] ECR 1355. In Case C-327/91 *France v. Commission*, the Court held, at para. 25, that an agreement between the European Commission and the United States regarding the application of their competition laws fell "squarely within the definition of an international agreement concluded between an international organization and a State, within the meaning of Article 2(1)(a)(i) of the Vienna Convention of 21 March 1986 on the Law of Treaties between States and International Organizations or between International Organizations" and accordingly, at para. 42, the plea of lack of competence on the part of the Commission to conclude the agreement had to be upheld.

[25] Although Verwey states that "[t]he Court's definition is slightly broader because it includes oral agreements", it must be questioned whether such agreements, in the absence of their reduction to written form, would meet the EU's internal requirements for the conclusion of international agreements: Verwey, note 12, at 96.

[26] The Official Journal is available online at http://eur-lex.europa.eu/JOIndex.do (last accessed 21st August 2010). International agreements are published in the L II series. In addition, the EU Treaties Office Database "contains all the bilateral and multilateral treaties or agreements concluded by the European Union, the European Atomic Energy Community (EAEC), and the former European Coal and Steel Community (ECSC), and those concluded under the Treaty on European Union": see http://ec.europa.eu/world/agreements/default.home.do (last accessed 11th August 2010). The Council of the European Union also maintains a database of agreements concluded by the European Union: see http://www.consilium.europa.eu/App/accords/default.aspx?lang=EN&cmsid=297 (last accessed 11th August 2010).

In Chapter 2, the internal procedures for the conclusion of international agreements in Ireland and the European Union were outlined. These procedures must be complied with before the State or the EU expresses its consent to be bound by an international agreement.[27] The international procedures for becoming a party to an agreement depend on the terms of the particular agreement or, in default of provisions dealing with the matter, the general rules of international law.[28] In order to place the implementation of international agreements in its proper context and to explain the transition between the international and internal level, this section provides a brief overview of these procedures, which have occasionally been the subject of some confusion in the case-law. Article 11 of the Vienna Convention states that "the consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed".[29] The varied terminology in this area – as well as the distinct procedures to be followed internally, on the one hand, and internationally, on the other - often give rise to confusion.[30]

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[27] If these internal procedures are not complied with, the conclusion of the international agreement will not be valid as a matter of Irish law, whatever its status in international law: for an example, see *The State (Gilliland) v. Governor of Mountjoy Prison* [1987] IR 201. Similarly, in the European Union, if an international agreement has not been concluded in accordance with the Treaties, this may give rise to an action for annulment: see Case C-360/93 *Parliament v. Council* [1996] ECR I-1995 and Case C-317/04 and C-318/04 *Parliament v. Council* [2006] ECR I-4721.

[28] See generally Aust, note 1, Chapter 7.

[29] In some cases, particularly in the context of bilateral agreements, an agreement may provide for its entry into force upon signature by the parties or by way of an exchange of notes. However, in many cases, particularly in the context of multilateral agreements, an agreement will be signed, or notes exchanged, subject to ratification, thereby enabling a party to comply with its own internal constitutional procedures for the conclusion of international agreements. Signature, or exchange of instruments, in the case of an international agreement which is subject to ratification, acceptance or approval, does not oblige a State to consent to be bound by the treaty. In this regard, see *Hutchinson v. Minister for Justice* [1993] 3 IR 567 (rejecting the applicant's claim that there was a principle of international law, or provision in the Convention, requiring Ireland to ratify the Council of Europe Convention on the Transfer of Sentenced Persons which it had signed); *Conway v. Ireland & Ors* [2009] IEHC 472 (rejecting a similar claim in respect of the Aarhus Convention). However, it does create an obligation "to refrain from acts which would defeat the object and purpose of a treaty …until it shall have made its intention clear not to become a party to the treaty": Article 18, Vienna Convention. Ratification is an international act whereby a party establishes its consent to be bound by an international agreement by executing an instrument of ratification and, depending on the agreement, exchanging this for the instrument of ratification of the other party or lodging it with the depositary appointed under the terms of the agreement. As an alternative to ratification, some agreements provide for the expression of consent to be bound by acceptance or approval. In other cases, for example, in the case of a multilateral agreement which a state had not signed on its initial adoption, a party may accede to the agreement where its terms permit, or the existing parties to the agreement agree to, accession. As this short overview shows, much depends on the terms of the particular agreement.

[30] An example of this confusion in relation to the status of an international agreement vis-à-vis the State is *Anisimova v. Minister for Justice* [1998] 1 IR 186 where Morris J. stated (at 190) that "Ireland is a signatory to the United Nations Convention Relating to the Status of Refugees, 1951, and the Protocol of 1967 thereto but neither have been ratified by the State". In the Supreme Court, Murphy J. stated (at 194): "[t]hese were international agreements to which the State was a signatory. However, the obligations thereunder did not form part of our domestic law". Ireland had acceded to the

At the time of its becoming a party to a multilateral treaty, a party may make a reservation to the agreement, which purports "to exclude or to modify the legal effect of certain provisions of the treaty"[31] in their application to that party, or an interpretative declaration which is "a unilateral declaration, however phrased or named, made by a state whereby it purports to clarify the meaning or scope attributed to the treaty or certain of its provisions", the purpose of which is "very often to establish an interpretation which is consistent with the domestic law of the state concerned".[32]

Having concluded the appropriate internal and international procedures, the agreement will bind the parties thereto upon its entry into force. The manner in which a treaty enters into force is often expressly provided for in the terms of the agreement or, in the absence of such provision, will occur when all states have consented to be bound by the agreement.[33] In accordance with Article 26 of the Vienna Convention on the Law of Treaties, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith". As discussed in Chapter 1, the provisions of internal law will generally be no excuse for non-performance of the State's obligations under its international agreements.[34] The

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Convention on 29th November 1956 and to the Protocol on 6th November 1968. See also *Olaniran v Minister for Justice* [2010] IEHC 83 (where the Court described Ireland as a "signatory" to the United Nations Convention on the Rights of the Child in circumstances where the State had signed and ratified the Convention).

[31] Article 2(1)(b), Vienna Convention.

[32] Aust, note 1, at 127. Sometimes, as discussed below, this is done so as to avoid conflict between the obligations under the agreement and the provisions of domestic constitutional law.

[33] See Aust, note 1, at 168. In the case of agreements concluded by the Irish State, once they have entered into force, they will be laid before Dáil Eireann, published in the Irish Treaty Series, notified in Iris Oifigiuil and registered at the United Nations. Registration with the United Nations may take place after the agreement has entered into force for at least two parties but publication with the United Nations Treaty Series is generally delayed for some time after registration: Aust, note 1, Chapter 19. In the case of the European Union, notice of the conclusion of an international agreement will be published in the Official Journal. Up-to-date information on the status of an international agreement, such as the parties to the agreement, can be found, in the case of those treaties registered at the United Nations, in the United Nations Treaty Series. This information is also generally available, in the case of multilateral agreements, on the website of the international organisation or body under the aegis of which the international agreement has been concluded or, in the case of bilateral treaties, in the Treaty Series of the relevant State (only some of which maintain publicly available information reflecting the current status of their international commitments, such as the US Department of State's "Treaties in Force" collection, the French Foreign Ministry's "Base Pacte", or the United Kingdom's Treaties Online ("UKTO")). The Irish Treaty Series does not yet contain uptodate information of this kind.

[34] See Chapter 1, Section IV, referring to Article 27 of the Vienna Convention ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty"). This rule is without prejudice to Article 46 which provides that a State "may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance". On Article 46 in an Irish context, see Symmons, "International Treaty Obligations and the Irish Constitution: The McGimpsey Case" (1992), 41 *ICLQ* 311 (doubting its applicability to the alleged constitutional infirmities of the Anglo-Irish Agreement).

question which then arises is whether it is necessary, in order to give effect to its international obligations, to implement the agreement, or certain of its provisions, within the internal legal system. In light of the diversity of international agreements and the rarity with which such agreements expressly stipulate their intended internal effect, there is no universal answer to this question which depends on the terms of the particular international agreement and, ultimately, on the constitutional framework of the internal legal system.[35]

III. IMPLEMENTATION IN THE IRISH LEGAL SYSTEM

A. Introduction

Article 29.6 of the 1937 Constitution provides that "[no] international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas". This is the fundamental rule governing the status and effect of international agreements within the Irish legal system. This rule, carried over from the United Kingdom legal system,[36] encapsulates – in very clear terms and on a

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[35] See e.g. Higgins, *Problems and Process: International Law and How We Use It* (Oxford, 1995) at 210: after referring to the 'translation' of treaty obligations into domestic law, the author states: "Of course, *how* that is done, and, indeed, the decision as to whether it is required for all treaty obligations or only for some, is a matter for national determination. The extent to which treaty obligations may be examined or analysed in domestic courts, or give rise to claims in domestic courts, is a matter for domestic law. The existence of the treaty obligations as a commitment between the state parties thereto is a matter for international law".

[36] See e.g. Higgins, "United Kingdom" in Jacobs and Roberts, *The Effect of Treaties in Domestic Law* (Sweet & Maxwell, 1987), at 125 ("A treaty has no effect in English law unless it is made part of domestic law.... while this states the formal position, the reality is not so simple."); Aust, "United Kingdom" in Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement* (Cambridge, 2009), at 477 ("Under its dualist approach, the British constitution (mainly, but not entirely, unwritten) gives no special status to treaties: the rights and obligations they create have no automatic effect in domestic law".). For a judicial expression of this principle contemporaneous with the 1937 Constitution, which usefully sets out the rationale for this approach, see *Attorney-General for Canada v. Attorney-General for Ontario (Labour Conventions)* [1937] AC 326 (PC) (per Lord Atkin, at 347-348): "Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases before final ratification seek to obtain from Parliament an expression of approval. But it has never been suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament, or any subsequent Parliament, from refusing to give its sanction to any legislative proposals that may subsequently be brought before it. Parliament, no doubt, as the Chief Justice points out, has a constitutional control over the executive: but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone. Once they are created, while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default".

constitutional footing – the dualist approach to international agreements. The State's obligations under an agreement on the international plane are distinct from any obligations it or its organs may have within the Irish legal system.[37] This stands in contrast to the position within many European Union Member States, and within the European Union legal system itself (as will be considered later), where international agreements, upon their conclusion, form an integral part of the legal system.[38]

The effect of this rule is that, in the absence of legislation, which is the mechanism through which the Oireachtas - being composed of Dáil Eireann, Seanad Eireann and the President - may make a determination, an international agreement does not form part of Irish law, notwithstanding its binding effect on the State as a matter of international law. Such an approach clearly poses the risk of a conflict between the obligations of the State in international law, on the one hand, and its obligations in Irish law, on the other hand. If Irish law is in conflict with an international agreement – whether this is because the organs of government act in accordance with Irish law but in a manner which is incompatible with the international agreement in question or because they have entirely failed to give effect to such an agreement– this may give rise to the State's international responsibility.[39]

In order to minimise the risk of discrepancy between the international obligations of the State and Irish law, it is the State's "long-established practice"[40] not to become a party to any international agreement unless the State is in a position to enforce the provisions of the agreement.[41] According to the Department of Foreign Affairs' statement on Irish Treaty Practice, it is "rarely necessary for the terms of an

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[37] As described by Kearns J. in *Dublin City Council v. Fennell* [2005] 1 IR 604, at 615, in the context of the European Convention on Human Rights: "Prior to the Act of 2003, therefore, the Convention was said to be "binding on Ireland, but not in it". The Government was obliged to accept the ruling of the European Court in judgments against it, but the Convention otherwise placed no direct obligations on public authorities. Furthermore, legislative, executive or judicial measures, which appeared to conflict with the Convention, could not be the subject of a Convention specific challenge in the domestic courts."

[38] See Frowein and Oellers-Frahm, "L'application des traités dans l'ordre juridique interne" in Eisemann (ed), note 4, at 11-25.

[39] See generally Chapter 1, Section IV.

[40] Although the practice is indeed long-established, a more flexible approach was adopted during the Irish Free State era: see Fitzsimons, note 4, at 159-162. In more recent times, the ratification of the Rome Statute on the International Criminal Court (on 11th April 2002) preceded the domestic implementing measures (International Criminal Court Act 2006). In other cases, such as the Refugee Convention and the ECHR, the delay in implementing legislation is sometimes attributed to changing attitudes as to the necessity for domestic implementation.

[41] See the statement of the then Minister for Foreign Affairs (Mr. Aiken) to the Dáil in the course of the discussion on the Geneva Conventions Bill, 1962: 193 Dáil Debates 106 (14 February, 1962). According to the Department of Foreign Affairs, in Irish treaty practice, "the State must be in a position to meet the obligations it assumes under the terms of an international agreement from the moment it enters into force". In many cases, it is not possible for the State to meet its obligations "without first taking steps required by domestic law, or otherwise, enabling it to do so" (http://www.dfa.ie/home/index.aspx?id=351).

international agreement themselves to be incorporated into domestic law in order for the State to consent to be bound by that agreement or to fulfil the obligations it assumes under it".[42] Yet it has become increasingly common for international agreements to require some degree of implementation within the parties' internal legal systems and legislation implementing international agreements forms an important part of the Irish statute book.[43]

In some cases, already discussed in Chapter 2, legislation alone does not suffice to give effect to Ireland's obligations under an international agreements. Where the conclusion of an international agreement would be incompatible with the provisions of the Constitution, it is necessary to amend the Constitution in order for the State to become a party to the international agreement in question.[44] While such agreements are rare, and have concerned agreements of such fundamental importance as the European Treaties, the Good Friday Agreement and the International Criminal Court, they have nonetheless been one of the principal sources of amendment to the Constitution to date.[45] Following a constitutional amendment, it

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[42] See http://www.dfa.ie/home/index.aspx?id=351 (Home / Policies / International Law / Irish Treaty Practice). However, as noted by Thornton in the New Zealand context, "the importance of this topic is easily underestimated", observing that it was estimated (as of 1991) that "about one quarter of the 600 or so public Acts which make up New Zealand statute law give effect to international obligations": Thornton, *Legislative Drafting* (Butterworths, 1996), at 308. See also Gobbi, "Drafting Techniques for Implementing Treaties" (2000) 21(2) *Statute Law Review* 71.

[43] The number of statutes implementing international agreements varies from year to year. There are difficulties in accurately assessing the number of pieces of legislation implementing international agreements (e.g. where the legislation is not expressly for this purpose; where it forms one part of the background to legislation; where it is an EC/EU measure, and, in the pre-Lisbon era, whether it was adopted under the second or third pillar, etc.) However the overall trend may be described in the following terms. First, in the early decades (1920s-1940s), there was a low but reasonably constant number of pieces of implementing legislation (averaging one or two statutes per annum, with occasional rises). Secondly, between the late 1940s and the 1960s, there was a slow but somewhat uneven rise in the volume of implementing legislation (averaging two or three statutes per annum). Since the 1970s, there has been a noticeable rise in the volume of implementing legislation (even leaving to the side European Union measures). In the 2000s, this rise is marked (averaging between 6 and 7 statutes per annum for 2000-2007). These figures must be seen in the context of the overall number of pieces of primary legislation which, in the past decade for example, has been on average 40.

[44] A similar position maintains in the European Union: for example, in *Opinion 2/94 (Accession to the ECHR)* [1996] ECR I-01759, the Court of Justice held that the European Community could not accede to the European Convention on Human Rights without an amendment of the Treaties permitting it to do so. Article 6(2) TEU now provides that the EU "shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms" and negotiations to be enable it to do so are currently ongoing.

[45] Constitutional amendments have been mooted in the case of other agreements of importance, such as the United Nations Charter and the European Convention on Human Rights (ECHR): see e.g. "Article 29"(suggesting a constitutional amendment to reflect Ireland's membership of the United Nations) and "Introduction to Fundamental Rights" (considering the various approaches to giving effect to the ECHR in Irish law) in *Report of the Constitution Review Group* (Stationery Office, 1996). In respect of the Charter, no step has been taken to accord domestic effect to its provisions; in respect of the ECHR, its implementation has now taken place through legislation and thus at a sub-constitutional level in the European Convention on Human Rights Act 2003.

will then be possible to give further effect to the agreement through legislation.[46] Indeed, it is by virtue of such amendments – the succession of amendments to Article 29.4 resulting from EU membership – that international agreements concluded by the European Union, along with much of the rest of EU primary and secondary law, take effect within the Irish legal system. As an alternative to constitutional amendment, in some cases, it may be possible for the State to make a reservation in respect of a particular obligation under an international agreement which may be incompatible with the Constitution.[47] At the other end of the spectrum, there are agreements which may be given some effect within the Irish legal system without the necessity of legislation, for example through changes in administrative practice.[48]

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The rationale for the approach to the implementation of international agreements in Article 29.6 is to be found in the scheme of government established by the Constitution.[49] The treaty-making power is vested in the Government by virtue of Article 29.4.1° and the process of treaty-making, traditionally and still today, rarely provides the opportunity for parliamentary or public engagement.[50] Under the Irish

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[46] See e.g. European Communities Act 1972 and its successors, including the European Union Act 2009; the British-Irish Agreement Act 1999; the International Criminal Court Act 2006.

[47] In this context, the description of the practice by the then Minister for Foreign Affairs (at 396 Dáil Debates 2214 (13 March 1990)) is instructive: "The Government may deem a reservation necessary where constitutional, legislative or other considerations might conflict with the full application of a provision of the instrument in question. The effect of a reservation is to limit the application of an element of the instrument to Ireland. This may be necessary, for example, to enable the completion of legislative measures enabling full compliance with the instrument". The Minister then proceeded to comment upon the various reservations or declarations made by the State in relation to the International Covenants on Civil and Political Rights and on Social, Economic and Cultural Rights. In respect of the latter, by way of example, he referred to the reservation which it was "deemed prudent to make" to Article 13(2)(a) of the Covenant, dealing with compulsory primary education, so as to protect the right to allow parents to educate children in their homes in accordance with Article 42.2 of the Constitution.

[48] See e.g. *O'Leary v. Minister for Transport* [1998] ELR 113 (referring to qualifications required for radio officers in order for Ireland to comply with UN conventions on broadcasting on aeronautical and maritime frequencies). Of course, prior to the enactment of the Refugee Act, the Government expressed its willingness to follow a certain set of procedures set in "the Von Armin letter" – discussed below in the context of the *Fakih* and *Gutrani* cases – for the consideration of applications for asylum under the United Nations Convention on the Status of Refugees: see below Section III.C.ii.b.

[49] As Pescatore observed, where treaties are concluded and put into force outside the control of the ordinary legislative bodies, difficulties arise at the stage of implementation and "such treaties will not easily be recognised as a legitimate part of a democratic state's legislation": Pescatore, "Conclusion" in Jacobs and Roberts, note 36, at 276.

[50] This is the case even within the context of the European Treaties, the drafting of the Charter of the Fundamental Rights and of the ill-fated Treaty on the Constitution of Europe being notable exceptions: on the former, see de Búrca, "The Drafting of the European Union Charter of Fundamental Rights" (2001) 26 *ELRev* 126. More recently, civil society groups have played important role in the negotiation process in respect of a number of important multilateral conventions: see Boyle and Chinkin, *The Making of International Law* (Oxford University Press, 2007), Chapter 2. Of course, even without direct participation, consultation with lobby groups and civil society feeds into policy-making in this area e.g. in the context of Ireland's role in EU policy positions at WTO negotiations,

Constitution, only in the case of international agreements involving a charge upon public funds must the approval of Dáil Eireann be obtained prior to the State's giving its consent to be bound. Yet Article 15.2.1° vests in the Oireachtas "the sole and exclusive power of making laws for the State". Thus, if international agreements, which for their full implementation must form part of Irish law or require amendment of existing Irish law, were to be given the force of law without recourse to the Oireachtas, the Government could effectively circumvent the law-making power conferred on the Oireachtas by Article 15.2.1° through the exercise of its treaty-making power. This rationale was articulated in *Re Ó Laighléis*,[51] the seminal case on Article 29.6, where Davitt P. stated:

> If this principle were not to be observed it would follow that the Executive Government by means of an international agreement might, in certain circumstances, be able to exercise powers of legislation contrary to the letter and the spirit of the Constitution. The right of the citizens of this State to be bound by no other laws than those enacted by their elected representatives in the Oireachtas assembled is one to be carefully preserved and jealously guarded.[52]

Thus, Article 29.6 forms an important part of the scheme of democratic control of law-making established by the provisions of 1937 Constitution.

At the same time, it must be recognised that, as in most Westminster parliamentary systems, the Government is drawn from, and forms part of, Dáil Eireann, the lower parliamentary chamber. In practice, the attitude of the Government, having regard to its control of the majority of members of the Oireachtas, as well as its schedule and legislative activity to a great extent, has a critical influence on the attitude and approach of the Oireachtas. Moreover, the parliamentary role in this area may be considerably more circumscribed that in other areas of its legislative activity. By the time the Oireachtas is in a position to

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the Minister for Foreign Affairs has noted "substantial consultations with a wide range of interested parties on issues that cross the full spectrum of WTO trade matters" and referred to "extensive consultations and dialogue [which] have been undertaken and continues with Departments of State and agencies under their aegis, with business and with wider civil society": see 561 Dáil Debates 1029 (18 February 2003).

[51] *Re Ó Laighléis* [1960] 1 IR 93.

[52] [1960] 1 IR 93, at 103. It has been reaffirmed more recently by the Supreme Court in *Kavanagh v. Governor of Mountjoy Prison* ([2002] 3 IR 97, at 129) where Fennelly J. stated:

> The government has the exclusive prerogative of entering into agreements with other states. It may accept obligations under such agreements which are binding in international law. The Oireachtas, on the other hand, has the exclusive function of making laws for the State. These two exclusive competences are not incompatible. The government may ask the Oireachtas to pass the necessary legislation where it wishes the terms of an international agreement to have effect in domestic law. If this does not happen, Article 29.6 applies.

determine whether or not to give effect to an international agreement, the form and substance of the international agreement, to which the implementing legislation is designed to give effect, has been adopted and is no longer capable of amendment. In its enactment of implementing legislation, the Oireachtas cannot ignore or interfere with the provisions of the international agreement without running the risk of compromising the fulfilment of the State's international obligations. Much depends on the level of discretion which is left to States in the implementation of an international agreement's provisions: in some cases, this may be minimal and the role of the Oireachtas may appear to be little more than a form of rubberstamping;[53] in other cases, considerable discretion may be left to States both as to whether, and precisely how, an agreement's provisions are given effect.[54] Nonetheless, under the constitutional scheme, the power to decide whether or not to make a particular law – and thus, in the case of treaty-implementing legislation, whether or not to give effect to a particular agreement – vests in the Oireachtas. In making this decision, the Oireachtas also ensures scrutiny of, and transparency in, the Government's exercise of the treaty-making power. In this way, the imprimatur of the democratically elected legislature is conferred upon agreements which are negotiated and concluded by Governments without parliamentary input.

Reflecting the basic rationale for the approach under Article 29.6, the decision whether or not to give effect to an international agreement in Irish law is ultimately a political one.[55] As Pescatore observed in his critique of the dualist approach to the implementation of treaties, one consequence of such an approach is that "a state may conclude a treaty and abstain from executing it in its internal law", a situation which "may last for years or even forever".[56] This comment has particular resonance in the Irish legal system in light of its history with the European Convention on Human Rights. Furthermore, because the decision is ultimately political, this approach also leaves open the possibility of divergent approaches to

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[53] See Jacobs, "Introduction" in Jacobs and Roberts, note 36, at xxv (describing the passage of legislation as being "little more than a formality" in systems where the Executive controls a Parliamentary majority).

[54] In the case of certain international agreements, there may be disagreement as to whether implementing legislation is even necessary in order to give effect to its terms. This is perhaps most famously the case in respect of international human rights obligations, such as the European Convention on Human Rights (ECHR) or the family of United Nations human rights treaties.

[55] As a result, the implementation of international agreements by way of domestic legislation may fall victim, as proposals for domestic legislation often do, to the vagaries of party politics or to the pressures of the system of Irish parliamentary democracy. Even if there is agreement in principle between the main parties that an international agreement should be implemented, there may be delays in doing so due to the demands imposed on the Oireachtas by the broader legislative programme of the Government.

[56] Pescatore, "Conclusion" in Jacobs and Roberts, note 36, at 282.

international obligations depending upon their subject-matter and potential effects within Irish law.[57] However, provided that there is an effective parliamentary processes in place to take charge of the effective implementation of treaty commitments, something which has been lacking in Ireland to date,[58] these risks do not necessarily undermine the basic rationale of this approach to the implementation of international agreements. At the end of the day, regardless of whether or not an international agreement has been implemented within the Irish legal system, the State and its organs of government must act in such a way as to uphold its international obligations in order to avoid the State's international responsibility being called into question. However, in the absence of implementing legislation, the tools by which the courts can do so are very limited.

As well as this rationale founded in concerns of separation of powers and democratic government, there are also other considerations which underpin the approach adopted in Article 29.6. It has already been observed that international agreements now impose wide-ranging obligations, many of which reach far within internal legal systems. As a result, it is important – from the perspective of both international and internal law – that those obligations are effectively implemented in a manner which is consistent both with international law and the overarching framework, culture and integrity of the internal legal system. An obligation to impose criminal liability for conduct provides a clear example of the difficulties that may arise in this regard. Merely conferring the force of law upon the treaty would not suffice to make such an obligation effective within the party's internal legal system. It must be translated into the criminal code of the party with the appropriate degree of precision and transparency as to the basis of criminal liability, the procedure to be followed, and the penalties which may be imposed. If this were not done, such a provision could well run the risk of falling foul of domestic constitutional and international human rights guarantees.[59] While such considerations

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[57] The relative speed with which treaties are implemented across different areas is a striking aspect of the treaty practice: while a somewhat arbitrary example, compare the approach taken e.g. agreements in the field of international finance (e.g. the practice in relation to the International Finance Corporation discussed below) to that in the field of international human rights (the main United Nations human rights treaties such as the International Covenant on Civil and Political Rights and International Covenant on Social, Economic and Cultural Rights).

[58] See Chapter 2, Section II.D, referring to the need for a more proactive system for the parliamentary scrutiny of treaty-making.

[59] In the Irish constitutional context, see *King v. Attorney-General* [1981] IR 223, at 263 (per Kenny J.): "It is a fundamental feature of our system of government by law (and not by decree or diktat) that citizens may be convicted only of offences which have been specified with precision by the judges who made the common law, or of offences which, created by statute, are expressed without ambiguity…". In the context of the ECHR, in addition to the general guarantee of the right to a fair

are particularly pertinent in the sphere of criminal law, they may equally be understood to apply to other areas of law, as part of the general concept of law and indeed of the rule of law under the Irish Constitution and under international human rights law, such as the European Convention on Human Rights.

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In the following subsections, it is proposed to examine more fully the practice of the Irish legal system in the implementation of international agreements. First, it is necessary to look at the manner in which the Oireachtas has given effect to international agreements through legislation and the status of such legislation. Secondly, it is necessary to examine the status and the possible indirect effects of international agreements which have not been enshrined in legislation. Finally, this section concludes with a brief assessment of the Irish approach to the implementation of international agreements.

Much of the consideration of, and case law on, Article 29.6 has focused on one particular international agreement, the European Convention on Human Rights. The Convention is undoubtedly one of the most important international agreements to which the State is party and the question of its domestic implementation sheds much light on the implementation of other international agreements. Yet the Convention is also, in many ways, an unusual and uncharacteristic international agreement, far-reaching in its terms, its mechanism of enforcement, and its effect across all areas of domestic law. For this reason, it is important to adopt a fuller view of the process of implementation in order to assess its effectiveness.

B. Implementation of International Agreements in the Irish Legal System

As a result of the fundamental principle laid down in Article 29.6, it is through legislation that international agreements take effect in Irish law and any status they enjoy within the Irish legal system derives from such legislation.

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trial in Article 6, Article 7, which provides for freedom against retroactive criminal offences and punishment, "incorporates the principle of legality, by which, in the context of criminal law, a person should only be convicted and punished on a basis of law: *nullem crimen, nulla poena sine lege*"; "As elsewhere in the Convention, the term 'law' also implies 'qualitative requirements, including those of accessibility and foreseeability…an individual must be able to know from the wording of the relevant provision and, if need be, with the courts' interpretation of it, what acts and omissions will make him criminally liable and what penalty will be imposed": see Harris, O'Boyle, Bates and Buckley eds, *Harris, O'Boyle and Warbrick Law of the European Convention on Human Rights* (2nd ed., Oxford, 2009), at 331 and 334. See *Streletz, Kessler and Krenz v. Germany* (2001) 33 EHRR 31 and *Kafkaris v. Cyprus* (2009) 49 EHRR 35.

i. Modes of Implementation of International Agreements in the Irish Legal System

Because of the diversity of international obligations binding on the State, the legislative practice in this area is extremely varied. This in itself offers an indication of the complexity of implementing international agreements within internal legal systems. By their very nature, international agreements and domestic legislation are different creatures.[60] While, in limited cases, such agreements can be given effect simply by conferring upon them the force of law (what will be termed direct implementing legislation), in most cases a far more nuanced approach is required in order to give full effect to the State's obligations (indirect implementing legislation). Before considering the specific modes of legislation used by the Oireachtas in this context, it is important to note that, in the case of *Leontjava*,[61] the Supreme Court has recently affirmed the freedom of the Oireachtas, subject to the Constitution, to choose the form in which it legislates, including how it gives effect to international agreements.

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[60] While the parties to international agreements will generally be States and/or international organisations, legislation is enacted by the relevant constitutional organs of a State (or, as in the EU, an international organisation) with general, binding effect on those within its jurisdiction (and sometimes beyond). The nature of the rights and obligations provided for in an international agreement often reflect this and differ considerably from those which are usually conferred or imposed by domestic legislation. Additionally, because they often involve a wide range of parties from different political, legal and linguistic backgrounds, the form and language of international agreements must often take a more flexible approach than might be adopted in domestic legislation. Of course, the extent to which these differences exist varies considerably and certain international agreements are drafted in a way that minimises such differences and enables their provisions to take effect directly within the legal systems of the parties to those agreements.

[61] *Leontjava v. D.P.P.* [2004] 1 IR 591. In that case, the applicants challenged, inter alia, the constitutionality of s.2(1) of the Immigration Act 1999, which gave statutory effect to certain orders made by the Minister under the Aliens Act 1935, these orders having been referred to, but their text not having been set out, in the Act of 1999. In the High Court, Finlay-Geoghegan J. concluded that "the democratic scheme established by the Constitution is that the law making power vested in the Oireachtas by Article 15.2 is constitutionally procedurally constrained and may be only exercised by the enactment by the Oireachtas of an Act, initiated as a Bill which is then passed or deemed to be passed by both Houses and signed by the President and promulgated as a law": [2004] 1 IR 591, at 612. However, on appeal, the Supreme Court rejected this argument, Keane C.J. stating that (at 638): "This court cannot accept the proposition that the framers of the Constitution in 1937, while conferring on the Oireachtas the exclusive role of making laws for the State, intended to limit their powers to legislate by prohibiting them from incorporating other instruments, such as secondary legislation and treaties, in an Act and giving them the force of law without setting out their provisions in extenso. As the decision of the House of Lords in *Institute of Patent Agents v. Lockwood* [1894] AC 347 demonstrates, that precise form of statutory incorporation by reference was already established towards the end of the nineteenth century and there is nothing in the Constitution to indicate that the choice of the Oireachtas to legislate in that rather than another form was in any way inhibited". While the decision was specifically concerned with legislation incorporating other instruments by reference and has been subjected to strong criticism (see Fanning, "Reflections on the Legislative Process following *Leontjava v Director of Public Prosecutions*" (2004) 39 *Ir Jur* 286; Fahey, "Reconsidering the Merits of the "Principles and Policies" Test: A Step Towards the Reform of Article 29.4.10° of the Constitution" (2006) 24 *ILT* 70; Doyle, *Constitutional Law: Text, Cases and Material* (Clarus Press, 2008), at 327-330), the wider principle underlying the decision is the freedom of the Oireachtas, subject to the Constitution, to determine the form and content of the legislation it enacts.

a. Direct Implementing Legislation

First, it is possible to retain the treaty text, or specific terms thereof, as the operative legal text, and confer upon that text, by way of an Act of the Oireachtas, the force of law within the State; the agreement is implemented directly into Irish law.[62] In other words, the Oireachtas determines that the international agreement itself should form part of Irish law. Adopting this approach, to use Bennion's words, "the form and language suitable for embodying an international agreement become, at the stroke of a pen, also the form and language of a municipal legislative instrument".[63]

This approach is frequently used in cases where the international agreement is designed to provide a uniform law across jurisdictions and is drafted so as to take effect directly within internal legal systems: for example, laws governing civil liability in the civil aviation[64] or maritime matters,[65] conferring privileges and immunities on international institutions or persons,[66] harmonising jurisdictional rules in a specific field,[67] among others.[68] Perhaps the most important example of such legislation is that giving effect to the European Treaties.[69]

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[62] Note in this context the different choice of terminology adopted by Bennion, *Statutory Interpretation: A Code* (Butterworths, 2002) who describes this process as "indirect enactment of treaty" (at 580) and Thornton, *Legislative Drafting* (Butterworths, 1996) who describes this as "the direct approach" (at 310).

[63] Bennion, note 62, at 581.

[64] See Air Navigation and Transport (International Conventions) Act 2004, s.4 (giving the force of law to the Warsaw Convention (as amended by Protocol No. 4) and the Montreal Convention).

[65] See Sea Pollution (Miscellaneous Provisions) Act 2006, s.7 (giving effect to the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001); Sea Pollution (Hazardous Substances) (Compensation) Act 2005, s.8 (giving effect to the International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996); Merchant Shipping (Liability of Shipowners and Others) Act 1996, s.7 (giving effect to the London Convention on Limitation of Liability for Maritime Claims, 1976), s.18 (giving effect to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 and its 1976 Protocol) and ss.31, 33 and 34 (giving effect to the certain provisions of the International Convention for the unification of certain rules of law relating to bills of lading (the Hague-Visby Rules)); Jurisdiction of Courts (Maritime Conventions) Act 1989, s.4 (giving effect to the International Convention relating to the arrest of seagoing ships) and s.11 (giving effect to the International Convention on certain rules concerning civil jurisdiction in matters of collision).

[66] See Diplomatic Relations and Immunities Act 1967, ss. 5 and 6 (giving the force of law to the Vienna Conventions on Diplomatic Relations and Consular Relations respectively).

[67] See Arbitration Act 2010, s.24 (giving the force of law to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Geneva Convention on the Execution of Foreign Arbitral Awards and its Protocol on Arbitration Clauses; International Interests in Mobile Equipment (Cape Town Convention) Act 2005, s.4 (giving effect to the Convention on International Interests in Mobile Equipment and its 'Aircraft Protocol'); Protection of Children (Hague Convention) Act 2000, s. 2 (giving effect to the Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children); Jurisdiction of Courts and Enforcement of Judgments Act 1998, s.5 (giving effect to the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, its Protocol and Accession Conventions) and s.18 (giving effect to the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters); Child Abduction and Enforcement of Custody Orders Act 1991, s.6 (giving effect to the Hague Convention on the Civil

The manner in which this is effected varies: as well as legislation giving effect to the agreement as a whole,[70] there are cases where only specified provisions[71] (or more generally "the applicable provisions"[72]) are given the force of law or where specified provisions are excluded from having the force of law.[73] The implementing legislation often expressly provides that judicial notice is to be taken of the relevant agreement.[74] While an agreement will sometimes be implemented by

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Aspects of International Child Abduction) and s.18 (giving effect to the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (Luxembourg Convention)).

[68] Criminal Justice (Mutual Assistance) Act 2008, s.5 (giving the force of law to certain articles of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and its Second Additional Protocol) and s.94 (giving the force of law to the Treaty between the Government of Ireland and the Government of the United States of America on Mutual Assistance in Criminal Matters); Customs and Excise (Mutual Assistance) Act 2001, s.2 (giving effect to the Convention on the use of information technology for customs purposes concluded by Member States of the EU, Agreement on its provisional application the Convention on mutual assistance and co-operation between customs administrations and certain Protocols thereto); European Communities and Swiss Confederation Act 2001, s.2 (giving effect to a range of agreements between the EC and Switzerland on the Free Movement of Persons, on Air Transport, on the Carriage of Goods and Passengers by Rail and Road, on Trade in Agricultural Products, on Mutual Recognition in Relation to Conformity Assessment, on Certain Aspects of Government Procurement, and on Scientific and Technological Cooperation); Criminal Justice (Theft and Fraud Offences) Act 2001, s.41 (giving effect to the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, and certain Protocols thereto); Europol Act 1997, s.2 (giving effect to the Europol Convention and Protocols thereto); International Carriage of Goods by Road Act 1990, s.2 (giving effect to the Convention on the Contract for the International Carriage of Goods by Road(CMR)).

[69] For the original treaties, see European Communities Act 1972, s.2. For the current position, see the European Union Act 2009, s.3.

[70] It is usually expressed in the following manner: "Subject to the provisions of this Act, [the international agreement] shall have the force of law in the State": for a recent example, see s.24 of the Arbitration Act 2010. See also Customs and Excise (Mutual Assistance) Act 2001, s.2(1); Sea Pollution (Miscellaneous Provisions) Act 2006, s.7(1); Protection of Children (Hague Convention) Act 2000, s.2(1); Merchant Shipping (Liability of Shipowners and Others) Act 1996, s.7(1), s.19(1) and s.31(1); Child Abduction and Enforcement of Custody Orders Act 1991, s.6(1) and s.21(1); International Carriage of Goods by Road Act 1990, s.2(1); Jurisdiction of Courts (Maritime Conventions) Act 1989, s.4(1) and s.11(1).

[71] Criminal Justice (Mutual Assistance Act) 2008, s.5(1); Merchant Shipping (Liability of Shipowners and Others) Act 1996, s.31(1); International Development Association Act 1960, s.3(8); International Finance Corporation Act 1958, s.3(7); Bretton Woods Agreements Act 1957, s.3(8).

[72] Air Navigation and Transport (International Conventions) Act 2004, s.4(1).

[73] Sea Pollution (Hazardous Substances) (Compensation) Act 2005, s.8(1); Customs and Excise (Mutual Assistance) Act 2001, s.7(1); Criminal Justice (Theft and Fraud Offences) Act 2001, s.41(1). Further variations exist. For example, it may be specified that the agreements enjoy the force of law "in relation to matters to which they apply" (International Interests in Mobile Equipment (Cape Town Convention) Act 2005, s.4(1)) or "in their application to the State" (Criminal Justice (Mutual Assistance Act) 2008, s.5(1); s.94(1)). Another variation is to provide that an agreement has effect in relation to the State: International Criminal Court Act 2006, s.60(2). In some cases, the relevant Minister will be vested with the power to give effect, by order, to provisions of the agreement: Customs and Excise (Mutual Assistance) Act 2001, s.7(2) and s.11, subject to approval by the Oireachtas;; Diplomatic Relations and Immunities Act 1967, s.5(2) and s.6(2) and Prisoners of War and Enemy Aliens Act 1956, s.3(1), subject to a negative resolution by the Houses of the Oireachtas.

[74] Sea Pollution (Miscellaneous Provisions) Act 2006, s.7(1); Sea Pollution (Hazardous Substances) (Compensation) Act 2005, s.8(1); Criminal Justice (Mutual Assistance Act) 2008, s.94(2); Customs and Excise (Mutual Assistance) Act 2001, s.2(1); Criminal Justice (Theft and Fraud Offences) Act 2001, s.41(1); Merchant Shipping (Liability of Shipowners and Others) Act 1996, s.7(1), s.19(1) and s.31(1); Child Abduction and Enforcement of Custody Orders Act 1991, s.6(1) and s.21(1);

way of a statute specifically drafted for this purpose,[75] in other cases it will form part of more general legislation, regulating a particular sphere of activity.[76]

The agreement will often, but not always,[77] be scheduled to the Act.[78] It is desirable to include the agreement in such a schedule so that, as a matter of principle, the relevant agreement, which is to form part of Irish law, is accessible in the same manner as any other Irish legislation.[79] In addition to giving the force of law to the agreement, the legislation may also make further provision to ensure its effectiveness within the Irish legal system, through substantive or ancillary measures.[80]

This approach has the obvious advantage of ease of implementation.[81] It also allows the agreement to speak for itself, which is important for the purposes of its interpretation. As Thornton has observed, the "convention in effect relies on its own language and must stand on its own feet".[82] A potential disadvantage of this approach is the possibility that there may be a lack of fit between the agreement and domestic law.[83] Although the tendency for this form of implementation is

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International Carriage of Goods by Road Act 1990, s.2(1); Jurisdiction of Courts (Maritime Conventions) Act 1989, s.4(1) and s.11(1).

[75] In more recent legislative practice, this is reflected in the title of the legislation: see e.g. International Interests in Mobile Equipment (Cape Town Convention) Act 2005; Air Navigation and Transport (International Conventions) Act 2004; Jurisdiction of Courts (Maritime Conventions) Act 1989.

[76] See e.g. Criminal Justice (Theft and Fraud Offences) Act 2001, s.41.

[77] A notable example of a failure to schedule the agreements thereby given the force of law is the European Communities Act 1972.

[78] In the United Kingdom, this method was first used in the Carriage of Goods by Sea Act 1924 (where the schedule was in fact a draft of the treaty). In certain older statutes, reference is made to the agreement, as set out in the Schedule: for example, section 4(1) of the Veterinary Surgeons Act 1952 provided that the "agreement set forth in the Schedule to this Act (in this section referred to as the scheduled agreement) is hereby confirmed and shall have the force of law" and section 5(1) of the Diplomatic Relations and Immunities Act 1967, stated that the "provisions of the Vienna Convention on Diplomatic Relations done at Vienna on the 18th day of April, 1961, as set out in the First Schedule to this Act, shall have the force of law in the State".

[79] As Thornton suggests, "this action is desirable to facilitate communication and ready availability": see Thornton, note 62, at 310.

[80] Indeed, it is rare to find a piece of direct implementing legislation which does not also make provision for related matters. Common examples of such provisions include: the designation of national authorities for the purposes of the agreement (see e.g. Customs and Excise (Mutual Assistance) Act 2001, Sections 3, 4 and 6); the procedure for applications to the Irish courts; the conversion of monetary figures into the local currency; the payment of expenses incurred in the administration of the agreement; the making of orders by the Minister for the purpose of applying the agreement to other States which become parties thereto (see e.g. s.24(4), Arbitration Act 2010; Sea Pollution (Miscellaneous Provisions) Act 2006, s.4(1); Sea Pollution (Hazardous Substances) (Compensation) Act 2005,s.9.

[81] As Bennion observes, "all that is needed is a short Act stating that the provisions of the treaty shall have the force of law in the territory to which the Act extends": Bennion, note 62, at 580.

[82] Thornton, note 62, at 310.

[83] Bennion, note 62, at 581, is critical of 'loose drafting': "One inconvenience that the interpreter is likely to be required to cope with is disorganized composition instead of precision drafting. The drafting of treaties is notoriously sloppy – usually for very good reason. To get agreement, politic uncertainty is called for". However, while there may be some justification in the latter comment, it is by no means clear that international agreements (particularly those designed to take effect directly

"growing"[84] and it should be favoured where "the contents of the Convention are capable of effective application in this way",[85] there are obvious limits to the types of agreements which are appropriate for direct implementation and, in many cases, an alternative approach must be adopted.

b. Indirect Implementing Legislation

The main alternative to direct implementation is indirect implementation,[86] which is where the Oireachtas, by way of legislation, gives effect to the substance of the agreement through specific statutory provisions which may be more or less analogous to those of the agreement. The agreement itself does not enjoy the force of law in the State except insofar as its terms are incorporated into the text of the domestic legislation[87] but the Act will frequently contain a schedule with the text of the agreement, which is set out "for convenience of reference".[88]

Indirect implementation requires a detailed assessment of the provisions of the international agreement, the state of domestic law, and the agreement's potential effects on domestic law.[89] Certain categories of agreement tend to require indirect implementation as a matter of course: for example, those agreements imposing criminal liability for certain conduct invariably require this approach because it is for each party's legal system to determine how this is to be effected in line with their existing criminal justice systems, procedures and penalties.[90] However, the subject-

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within national legal systems) are always more guilty of loose drafting than pieces of domestic legislation.

[84] Bennion, note 62, at 580.

[85] Thornton, note 62, at 310.

[86] Bennion, note 62, at 580, refers to this as "direct enactment", while Thornton, note 62, at 311, describes it as the "indirect approach".

[87] In this regard, see *Brady v. Haughton* [2006] 1 IR 1, at 10: referring to s.51 of the Criminal Justice Act 1994 which was designed to allow the State to ratify the European Convention on Mutual Assistance in Criminal Matters, Murray C.J. stated that "the Convention is an instrument of public international law and as such it has no direct effect within the State, absent any statutory provision so providing".

[88] Thornton takes the view that the inclusion of such a schedule is preferable "on the grounds of fuller communication": see Thornton, note 62, at 311.

[89] As with purely domestic legislation, guidance is often found in the approach adopted in other common law jurisdictions.

[90] See e.g. Cluster Munitions and Anti-Personnel Mines Act 2008, ss.6-9 (criminalising the use of cluster munitions and anti-personnel minues); Criminal Law (Human Trafficking) Act 2008, ss.2, 3, and 5; Nuclear Test Ban Act 2008, s.2); International Criminal Court Act 2006, ss.7 and 8 (criminalising genocide, crimes against humanity and war crimes and repealing the Genocide Act 1973); Criminal Justice (Safety of United Nations Workers) Act, 2000, ss.2-4 (giving effect to the Convention on the Safety of United Nations and Associated Personnel); Criminal Justice (United Nations Convention Against Torture) Act, 2000, ss.2-3 (giving effect to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment); International War Crimes Tribunal Act 1998, s.35; Geneva Conventions Act, 1962, s.3-4 (giving effect to the grave breaches and minor breaches provisions of the Geneva Conventions of 1949) and the Geneva Conventions

matter of indirect implementing legislation is diverse as the following examples show: cross-border maintenance,[91] intellectual property,[92] international carriage of goods,[93] illicit trafficking by sea,[94] regulation of whaling,[95] prevention of pollution at sea,[96] salvage of vessels,[97] prevention of corruption,[98] containment of nuclear weapons,[99] radiological protection,[100] protection of animals kept for farming purposes,[101] the granting of privileges and immunities,[102] the establishment of an independent monitoring commission to oversee decommissioning in Northern Ireland,[103] the establishment of a fund for the acquisition of carbon credit units under

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(Amendment) Act 1998 (giving effect to the Additional Protocols). In addition, many offences of an ancillary nature have been created e.g. Aviation (Preclearance) Act 2009 (s.3(2) and s.7).

[91] Maintenance Act 1994 (giving effect to the New York Convention on the recovery abroad of maintenance and the Rome Convention between the member states of the European Communities on the simplification of procedures for the recovery of maintenance payments).

[92] Patents Act 1992 (giving effect to the Paris Convention for the Protection of Industrial Property, the Patent Co-operation Treaty and the European Patent Convention).

[93] International Carriage of Perishable Foodstuffs Act 1987 (giving effect to the Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be Used for such Carriage (ATP)); Carriage of Dangerous Goods by Road Act 1998 (giving effect to the European Agreement concerning the international carriage of dangerous goods by road (ADR)).

[94] Criminal Justice (Illicit Traffic by Sea) Act 2003 (giving effect to the Council of Europe Agreement on Illicit Traffic by Sea implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances).

[95] Whale Fisheries Act 1937 (giving effect to the International Convention for the Regulation of Whaling).

[96] Oil Pollution of the Sea (Civil Liability and Compensation) Act 1988 (as amended by the 1998 and 2003 Amendment Act)(giving effect to the International Convention on Civil Liability for Oil Pollution Damage, 1969 and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971).

[97] Merchant Shipping (Salvage and Wreck) Act 1993 (giving effect inter alia to the International Convention on Salvage, 1989).

[98] Prevention of Corruption (Amendment) Act, 2001 (giving effect to the EU Convention on the fight against corruption involving officials of the EC and of Member States, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and the Criminal Law Convention on Corruption).

[99] Containment of Nuclear Weapons Act 2003 (giving effect to the 1998 Protocol to the Agreement between the Non-Nuclear Weapons States of the European Atomic Energy Community, the European Atomic Energy Community and the International Atomic Energy Agency in implementation of Article III(1) and (4) of the Treaty on the Non-Proliferation of Nuclear Weapons).

[100] Radiological Protection Act 1991 (giving effect to the Convention on Assistance in the case of a Nuclear Accident or Radiological Emergency, the Convention on Early Notification of a Nuclear Accident, the Convention on the Physical Protection of Nuclear Material).

[101] Protection of Animals Kept for Farming Purposes Act 1984 (giving effect to the Council of Europe Convention for the Protection of Animals kept for Farming Purposes).

[102] Diplomatic Relations and Immunities Act 1967, Parts III to VIII (giving effect *inter alia* to the General Convention on the Privileges and Immunities of the United Nations adopted by the General Assembly of the United Nations, the Convention on the Privileges and Immunities of the Specialised Agencies of the United Nations, the General Agreement on Privileges and Immunities of the Council of Europe).See also Aviation (Preclearance) Act 2009, s.13; Nuclear Test Ban Act 2008, s.7; International Criminal Court Act 2006, s.60.

[103] Independent Monitoring Commission Act 2003 (giving effect to the Agreement between the Government and the Government of the United Kingdom establishing the Independent Monitoring Commission).

the Kyoto Protocol,[104] and the assertion of jurisdiction, for example, in accordance with the United Nations Convention on the Law of the Sea or the Rome Statute on the International Criminal Court.[105]

The precise approach to indirect implementation varies widely according to the requirements of the particular international agreement.

In some cases, increasingly rare,[106] the Act makes no express reference to the international agreement to which it is designed to give effect.[107] In most cases, the Act expressly refers to the international agreement thereby being given effect, whether in the long title (which might declare that its purpose is to give effect to the international agreement) or sometimes, in more recent practice, by way of a specific 'purpose provision' within the operative text of the legislation.[108]

As with direct implementation, in some cases, legislation is enacted solely and specifically so as to give effect to the terms of an international agreement while, in others, implementation takes place within the context of general, more wide-ranging legislation within a field.[109] So too, the agreement may be implemented in whole or in part by legislation: in some cases, only a small number of provisions, or

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[104] Carbon Fund Act 2007 (which the long title describes as an Act to provide for the establishment of a fund to be known as the Carbon Fund to be utilised for the acquisition of Kyoto units and other such instruments or assets by the State to meet international climate change obligations under the United Nations Framework Convention on Climate Change… and the Kyoto Protocol to the Convention…).

[105] See the Sea Fisheries and Maritime Jurisdiction Act 2006, Part 3 (giving effect to the provisions of UNCLOS relating to the exclusive economic zone) and the International Criminal Court Act 2006, s.12 (providing for extraterritorial jurisdiction in relation to ICC offences).

[106] See Thornton, note 62, at 311: "this situation usually arises when it is considered that existing law already implements the Convention and no further legislation is required. It is clear from *Salomon*'s case that in case of ambiguity a court will refer to a convention although the convention is not mentioned in the legislation implementing it. The danger is that if there is no mention of the convention its relevance may be overlooked when the statute is being interpreted or amended. It is clearly helpful to introduce specific mention of the convention if it is practical to do so. It may not be practical to do this in treaties such as human rights treaties that are relevant to broad areas of law". He also comments that it is desirable that the reference to the Convention should be presented prominently and not, for instance, in an obscure definition; a specific purpose provision making it clear that the intention of the law is to give effect to the convention is recommended.

[107] See e.g. Part VIII of the Succession Act 1965 (Conflict of Laws relating to Testamentary Dispositions) which was designed to give effect to the Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions: 215 Dáil Debates 2016 (25 May, 1965).

[108] See the Air Navigation and Transport (International Conventions) Act 2004, s.2: "The purpose of this Act is to give effect, as law of the State, to certain international conventions regulating the international carriage of passengers and goods by air"; the International Interests in Mobile Equipment (Cape Town Convention) Act 2005, s.2: "The purpose of this Act is to give effect in the State to—(a) the Cape Town Convention, and (b) the Aircraft Protocol with regard to aircraft equipment."

[109] For example, many of the provisions of the Criminal Justice Act 1994 which put in place a system for inter-state mutual assistance in criminal matters (and which have now been overtaken by the Act of 2008), were enacted in order to give effect to the Council of Europe Convention on Mutual Assistance in Criminal Matters (1959) , the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (1990) and the 1988 Vienna Drugs Convention, although they are general in nature and there is no reference to those conventions in the statutory provisions.

even a single provision, may require implementation;[110] in others, the Oireachtas may choose not to give effect to certain provisions.[111]

Sometimes the provisions of an international agreement may form part of the backdrop to the adoption of legislation, without that legislation being enacted solely or directly for the purposes of giving effect to the international agreement. Thus, in the case of the Equal Status Act 2000, which were primarily designed to give effect to certain European Union directives in the field, a secondary reason for their enactment was to enable the State to ratify the Committee on the Elimination of Racial Discrimination (CERD), that Act prohibiting discrimination, *inter alia*, on the ground of race.[112] Similarly, the Status of Children Act 1987, which followed upon a Law Reform Commission recommendation and the adverse ruling of the European Court of Human Rights in *Johnston v. Ireland*,[113] also enabled the State to ratify the European Convention on the Status of Children Born out of Wedlock, adopted by the Council of Europe in 1975.[114] As discussed further in Chapter 6, adverse rulings of the European Court of Human Rights have often been a trigger for legislative reform.[115]

Tailoring or translating international obligations for internal legal systems is often a difficult task for drafters and legislators alike. However, the principal benefit of indirect implementation is that it allows a certain degree of translation of the agreement so as to improve its fit within the broader legislative and legal frameworks

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[110] For early examples e.g. Spanish Trade Agreement Act 1936, s.2 (restricting the use of descriptions properly applicable only to Spanish wines); Portuguese Treaty Act 1930, ss.1 and 2 (restricting the use of the words port and madeira respectively).

[111] For example, certain provisions of the United Nations Convention on the Status of Refugees are not given effect by the Refugee Act 1996 e.g. Article 31 (on which, see *N.S. v. Anderson* [2008] 3 IR 417). An unusual means of implementation is that found in s.79 of the Industrial Designs Act 2001 where, in respect of the Geneva Act of the Hague Agreement concerning the International Registration of Industrial Designs, the Oireachtas provided that the Minister for Enterprise "may prescribe such matters as he or she considers appropriate for giving effect in the State to the provisions of the Hague Agreement".

[112] See e.g. the statement of the then Minister for Justice on the introduction of the Equal Status Bill 1999: 505 Dáil Debates 336 (20 May, 1999).

[113] (1987) 9 EHRR 203.

[114] See 372 Dáil Debates 2508. The Firearms and Offensive Weapons Act 1990, the primary purpose of whcih was, according to the Minister introducing the legislation, "to provide adequate legislative controls on the possession and availability of offensive weapons while, at the same time, avoiding any unnecessary or unreasonable interference with people's right to possess and use articles which, while they might be employed as offensive weapons, had various legitimate sporting, recreational and other uses", also enabled the State to ratify the Council of Europe Convention on the Control of the Acquisition and Possession of Firearms by Individuals 1978: 393 Dáil Debates 1943(28 November 1989). In a similar vein, section 8(2) of the Broadcasting Act 1990 (which facilitated ratification of the Council of Europe's Convention on Transfrontier Television).

[115] Chapter 6, Section III.A.(i).

of the state party.[116] The danger and potential downside to this approach is that it entails the risk of deviating from the meaning, substance and effect of the international agreement to which it is designed to give effect.[117]

c. Framework Legislation

Thirdly, in cases where the treaties in question consist of an evolving network of agreements, the Oireachtas has employed a basic legislative framework which allows for the direct implementation of such agreements without the need for new legislation every time a new agreement is concluded. There are two principal examples of this approach in Irish law, which may be regarded as a variant of the direct implementation approach.

First, in the case of extradition agreements, a specific legislative regime, dealing with a matter of international concern which is not otherwise the subject of domestic legislation, has been put in place to give effect to the State's extradition agreements. While there has been significant change in this area in the past decade, with the introduction of the European Arrest Warrant to replace existing extradition agreements between EU Member States,[118] the core structure for the implementation of other extradition agreements continues to be laid down in Part II of the Extradition Act 1965, as amended by s.49 of the European Arrest Warrant Act 2003. Section 8(1) of that Act provides that, where the State has concluded an extradition agreement with another country, the Minister for Foreign Affairs may, after consultation with the Minister for Justice, by order apply Part II of the Act of 1965 in relation to that country.[119] Such an order must embody the terms of the extradition

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[116] It is for this reason that Bennion has described this approach to legislative implementation as being the "most satisfactory": Bennion, note 62, at 580.

[117] Pescatore has spoken of the "treaty being, by this metamorphosis, deprived of its essential features: it loses both its contractual and its international character and its effect can be restricted at will or ended by contrary legislation": Pescatore, note 220, at 282. See also Buergenthal, "Self-Executing and Non-Self-Executing Treaties in National and International Law" in (1992-IV) 235 *Recueil des Cours* 303, at 362, who comments: "the domestic normative status of the treaty as a source of law diminishes progressively as the implementing legislation moves from this optimal form of incorporation to the other extreme where no reference at all is made to the treaty…".

[118] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (as amended). Moreover, extradition with the United States of America is now governed in large measure by the 2003 U.S.-EU Extradition Agreement: see Council Decision 2009/820/CFSP and S.I. 45/2010 Extradition Act 1965 (Application of Part II) (Amendment) Order 2010 (referring inter alia to the motions of approval before Dáil Éireann and Seanad Éireann on 16th October 2008). On the relationship between the U.S.-E.U. agreement and Member States' bilateral agreements, see Article 3 of the agreement.

[119] Section 8 (as amended) makes further provision for amendments to agreements (s.8(2)), that orders shall recite or embody the terms of the agreement (s.8(3)), for orders applying the Act otherwise than in pursuance of an extradition agreement which "may be made subject to such conditions, exceptions

agreement and, in accordance with s.8(5), "every extradition agreement ... shall, subject to the provisions of this Part, have the force of law in accordance with its terms". Under Section 4 of the 1965 Act, every order made under the Act shall be laid before each House of the Oireachtas "as soon as may be after it is made" and either House may pass a resolution within the next 21 sitting days which would have the effect of annulling the order (a negative resolution procedure).[120] Thus, the Oireachtas has laid down the general principles governing extradition (in Part II of the Act) but it gives the Executive power to make orders applying the Act to countries with which Ireland has concluded an extradition agreement and thereby giving such agreements the force of law. Although the Oireachtas may annul such orders in theory, the reality is that the Oireachtas grants the Executive the power to implement extradition agreements in Irish law by way of secondary legislation. This enables the Government to enter into, and implement, an expanding web of extradition agreements as they are concluded without the necessity of recourse to an Act of the Oireachtas on the conclusion of each individual agreement.[121]

Secondly, in the case of bilateral agreements providing for relief against double taxation,[122] and more recently for the exchange of information on taxation,[123]

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and qualifications as may be specified in the order" (s.8(4)), for revocation or amendment of orders (s.8(6)), for publication of orders in Iris Oifigiúil (s.8(8)).

[120] Note the practice in some recent legislation of using an express approval procedure in the place of a negative resolution procedure: see e.g. Customs and Excise (Mutual Assistance) Act 2001, s.7(2) and s.11.

[121] Part II of the Extradition Act 1965 has also enabled the State to give effect to the extradition provisions of a range of international agreements: for recent examples, see S.I. No. 374/2005, Extradition Act 1965 (Application of Part II) (Amendment) Order 2005 (giving effect to the obligations in relation to extradition under the International Convention against the Taking of Hostages, the International Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents, the International Convention for the Suppression of Terrorist Bombings, and the International Convention for the Suppression of the Financing of Terrorism); S.I. No. 587/2004, Extradition Act 1965 (Application of Part II) (Amendment) Order 2004 (giving effect to the obligations in relation to extradition under the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation); S.I. No. 479/2003 — Extradition Act 1965 (Application of Part II) (Amendment) 2003 (giving effect to obligations under the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions); S.I. No. 173/2002 — Extradition Act 1965 (Application of Part II) (Amendment) Order 2002 (giving effect to obligations under the United Nations Convention Against Torture).

[122] According to the Revenue website, "Ireland has signed comprehensive double taxation agreements with 59 countries, of which 49 are in effect": see http://www.revenue.ie/en/practitioner/law/tax-treaties.html (last accessed 21 August 2010). The countries with whom Ireland has signed agreements are the following: Albania; Australia; Austria; Bahrain; Belarus; Belgium; Bosnia Herzegovina; Bulgaria; Canada; Chile; China; Croatia; Cyprus; Czech Republic; Denmark; Estonia; Finland; France; Georgia; Germany; Greece; Hong Kong; Hungary; Iceland; India; Israel; Italy; Japan; Republic of Korea; Latvia; Lithuania; Luxembourg; Macedonia; Malaysia; Malta; Mexico; Moldova; Morocco; Netherlands; New Zealand; Norway; Pakistan; Poland; Portugal; Romania; Russia; Serbia; Slovak Republic; Slovenia; South Africa; Spain; Sweden; Switzerland; Turkey; United Arab Emirates; United Kingdom; United States of America; Vietnam; Zambia.

a framework for implementing such agreements has been created within the general statutory code governing taxation. The key provision is Section 826 of the Taxes Consolidation Act 1997, as amended by section 35 of the Finance Act 2007. Under this provision, the Government may by order declare that such agreements have been made and that it is expedient that they should have the force of law. Subject to the approval of the draft order by Dáil Eireann and the amendment of the Schedule to the Finance Act to include a specific reference to the particular agreement, the order – which contains the text of the agreement – shall have the force of law as if it were an Act of the Oireachtas.[124]

d. Other Forms of Implementing Legislation

While most implementing legislation falls broadly within the preceding categories, there are other distinctive methods of implementing international agreements to be found in the practice of the Oireachtas.

In the case of agreements involving Irish participation in international financial institutions, for example, it will often be necessary, in accordance with the constitutional scheme, for the Dáil to approve the terms of such an agreement and for the Oireachtas to provide the legal authority for the discharge of the State's contribution to the relevant institution's fund so as to assist it in undertaking its activities.[125] Membership of these institutions played an important role in Ireland's initial phase of economic development in the 1960s.[126]

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[123] Ireland has so far signed such agreements with the following countries: Anguilla; Bermuda; Gibraltar; Guernsey; Jersey; Liechtenstein; Turks and Caicos Islands; Isle of Man.

[124] Prior to the recent amendment, such agreements took effect without any amendment being made to the Finance Act to refer to the specific agreements. According to the then Minister for Finance, when introducing the Bill to Seanad Eireann, "[t]his section secures the position of existing double taxation agreements in Irish law by listing them in the new Schedule 24A": 186 Dáil Debates 1603 (28 March, 2007).

[125] In the case of the International Finance Corporation, for example, which provides funds for investment in emerging economies, after approving the terms of the agreement in section 2, section 3 of the International Finance Corporation Act 1958 makes general provision for contributions by the State to the Corporation. Similarly, in respect of agreements establishing the International Monetary Fund and the International Bank for Reconstruction and Development (the World Bank), after approving the agreement in section 2, section 3 of the Bretton Woods Agreements Act 1957 provides for certain payments to those institutions "as and when they become appropriate to be made on behalf of the Government, shall be made out of the Central Fund or the growing produce thereof". Where there are amendments to the founding agreements in respect of the payments or contributions to be made by member countries, it is necessary to amend the legislation: for this reason, the Bretton Woods Agreements Act has been amended in 1969, 1977 and 1999. The International Development Association, which forms part of the World Bank Group and provides grants or long-term loans at zero interest rates to the poorest developing countries, is financed by way of funding rounds ('replenishments') which occur every three years, at which member countries pledge contributions. In the International Development Association Act 1960, the Oireachtas approved the terms of the agreement in section 2 and the making of payments from the Central Fund in section 3. However, amending legislation has been necessary to take account of the outcome of each of the recurring

Furthermore, while it may be regarded as a form of indirect implementing legislation, the European Convention on Human Rights Act 2003 is so distinctive in its approach as to justify special consideration. The Act has been the subject of extensive commentary and it is not proposed to rehearse the many issues to which it gives rise within the limited confines of this section.[127] Designed, according to its long title, "to enable further effect to be given, subject to the Constitution, to certain provisions of the Convention … and certain protocols thereto", and largely modelled on the United Kingdom's Human Rights Act 1998, the mode of implementation has been described as "indirect" or "interpretative" incorporation.[128] The Convention is not given the force of law in the State; instead, a range of duties are imposed on organs of the State with a view to ensuring the conformity of Irish law with the Convention. First, under section 2, the courts "shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions". Secondly, section 3(1) of the Act provides that, subject to any statutory provision (other than the Act itself) or rule of law, "every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions". Thirdly, under section 5, "[in] any proceedings, the High Court, or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of section 2, on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration (referred to in this Act as "a declaration of incompatibility") that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions"; such a declaration does not affect the validity of the law in question but places an obligation on the Taoiseach to lay the declaration of incompatibility before each House of the Oireachtas within 21 sitting days of the making of the order. Thus, the legislation opens up the possibility of interplay or dialogue between the judicial and political organs of government in the context of the implementation of the

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replenishment rounds in 1971, 1973, 1977, for the Special Action Account in 1978, 1980, 1983, 1985, 1988, 1990, 1993, 1997, 2000 and 2004.

[126] See Tonra, *Global citizen and European republic: Irish foreign policy in transition* (Manchester Unviersity Press, 2006), at 48-49.

[127] See especially Kilkelly ed, *ECHR and Irish Law* (2nd ed, Jordan, 2009) and de Londras and Kelly, *The European Convention on Human Rights Act: Operation, Impact and Analysis* (Thomson Round Hall, 2010).

[128] See e.g. *Dublin City Council v. Fennell* [2005] 1 IR 604, at 618.

Convention.[129] Moreover, while the legislation takes a weaker form than that which is employed in respect of other international agreements (in that the Convention is not directly given the force of law),[130] its effect is nonetheless much wider and more far-reaching in many respects, as a result of the dynamic relationship between the Convention and the fundamental rights provisions of the 1937 Constitution.[131]

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This survey of the practice of the Oireachtas emphasises both the wide range of international agreements which require implementation within the Irish legal system and the complexity of the process which this entails. While in some cases, it is possible to implement such agreements simply by giving them the force of law and thereby permitting their direct application, most agreements require some degree of translation in order to be fully effective within the Irish legal system. Whereas in legal systems adopting a monist approach to international agreements, many of these issues might fall to be considered by the courts in determining whether agreements are directly effective or self-executing in nature,[132] in the Irish system, this is primarily a political process vested in the Oireachtas as the sole and exclusive law-making body under the Constitution.

ii. Status of International Agreements Implemented in the Irish Legal System

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[129] This can be seen in the *Foy* case discussed in Chapter 6, Section III.A.(ii). However, a declaration of incompatibility is no guarantee of such dialogue: see e.g. the case of *Donegan v Dublin City Council & Ors* [2008] IEHC 288 (where the High Court (Laffoy J.) declared section 62 of the Housing Act 1966 incompatible with the Convention). This and a series of other "section 62" cases are now under appeal to the Supreme Court and, notwithstanding the decision of the European Court of Human Rights in *McCann v. United Kingdom* (2008) 47 EHRR 40, legislative action remedying the position does not appear likely prior to the Supreme Court's ruling on the issue.

[130] The Act, and earlier the Bills, have been the subject to considerable critical comment: see e.g. O'Connell, "The ECHR Act 2003: A Critical Perspective" in Kilkelly ed, *ECHR and Irish Law* (1st ed., Jordan, 2004); Egan, "The ECHR Act 2003: A Missed Opportunity for Domestic Human Rights Litigation" (2003) 25 *DULJ* 230; Murphy and Wills, "The European Convention on Human Rights and Irish Incorporation – Adopting a Minimalist Approach" (2001) *Bar Review*, Part I, September, 542; Part II, October/November 41.

[131] This has been described vividly by Hogan in the following terms: "The net effect, therefore, will be to subsume the ECHR jurisprudence into domestic constitutional law....All of this means that, in the end, we will find that we are still driving the 1937 vintage model, albeit that its power and capacity have been boosted by spare parts borrowed from the 1998 and 2003 models": see Hogan, "Incorporation of the ECHR: Some Issues of Methodology and Process" in Kilkelly ed, note 139, at 34.

[132] Buergenthal, after referring to the issues regarding the effect and interpretation of international agreements in dualist systems, remarks that many of those issues "resemble those which arise in monist countries where the distinction is made between self-executing and non-self-executing treaties": Buergental, note 117, at 363.

Notwithstanding the different methods of implementation, it is through primary legislation, directly and indirectly (in the case of extradition and double taxation agreements), that international agreements are given effect in accordance with Article 29.6 and it is this status they enjoy within the Irish legal system. Thus, in contrast to the status of international agreements in some jurisdictions and within the European Union legal system itself,[133] international agreements are not afforded a higher status than ordinary legislation.

As with all other legislation, implementing legislation prevails over inconsistent secondary legislation or common law. However, such legislation must be consistent with the provisions of the 1937 Constitution. As already noted, in a number of cases, this has necessitated constitutional amendments in order to give the Government authority to conclude an international agreement and the Oireachtas authority to give effect thereto within Irish law.[134] The constitutional validity of legislation may be challenged in two ways: first, prior to its promulgation, in the context of a reference of the Bill to the Supreme Court by the President under Article 26 of the 1937 Constitution;[135] secondly, following its coming into force, in the context of a direct challenge before the superior courts.[136] However, all post-1937 Acts enjoy a presumption of constitutionality.[137]

In the case of conflict between different pieces of primary legislation, the courts will in the first instance endeavour to interpret the legislation in such a way as to avoid any such conflict.[138] However, where it is not possible to do so, a later statute prevails over an earlier inconsistent statute in accordance with the maxim *lex posterior derogat legi priori*.[139] Certain implementing legislation may contain express provisions which seek to circumvent this problem.[140] However, the normal

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[133] See *infra* Section IV.A.
[134] See *supra* Section III.A. See also Chapter 2, Section II.F.
[135] See Article 26.1.1° and Article 34.3.3°.
[136] See Article 34.3.2°.
[137] See Hogan and Whyte eds, *JM Kelly: The Irish Constitution* (4th ed, LexisNexis Butterworths, 2004), para. 6.2.167 *et seq.* In relation to the presumption of constitutionality of treaties themselves, see the judgments of Barrington J. in *Crotty v. An Taoiseach* [1987] IR 713 and *McGimpsey v. Ireland* [1988] IR 567, at 582 (discussed in Symmons, note 34, at 325-6).
[138] See *infra* Section III.C.ii.a.
[139] See Dodd, *Statutory Interpretation in Ireland* (Tottel, 2008), at 86-89.
[140] Thus, Section 826 of the Taxes Consolidation Act 1997 (as amended by s.35 of the Finance Act 2007) provides that double taxation agreements, to which effect is given by Order, "shall, notwithstanding any enactment, have the force of law as if each such order were an Act of the Oireachtas". In *Murphy (Inspector of Taxes) v. Asahi Synthetic Fibres (Ireland) Ltd.* [1985] IR 509, the High Court (O'Hanlon J.) indicated *obiter* that, if it were necessary for the Court to decide the issue (which it was not, on the facts of the case, because the Court found there to be no such inconsistency), he would take the view that in Ireland the provisions of a double taxation agreement contemplated by the predecessor of section 826 of the Act of 1997, "would prevail over legislative

rules applicable to legislation apply in equal measure to legislation implementing international agreements.

Special considerations apply in the case of the European Treaties, which are given the force of law in the Irish legal system by the European Communities Act 1972, as amended by the Treaty of Lisbon Act 2009 "under the conditions laid down" in those Treaties.[141] Allied with the immunity conferred upon the law of the European Union by Article 29.4 of the Constitution, this section ensures the direct effect and supremacy of the Treaties within the Irish legal system.[142]

Less clear-cut is the case of the European Convention on Human Rights. As already discussed, the Act of 2003 does not give direct effect to the Convention in Irish law but the effect of its indirect implementation is such that the Act of 2003 is not merely one statute among equals. Instead, its influence extends throughout the legal system. Notwithstanding its lack of any formal supra-legislative status, the Act is of a systemic character, potentially affecting, subject to the Constitution, the interpretation and application of all other rules of law. Of course, even before the enactment of the Act of 2003, the ECHR played an important role in the interpretation of the fundamental rights guaranteed under the Irish Constitution.

C. Non-Implementation of International Agreements in the Irish Legal System

The preceding section illustrates that many international agreements to which Ireland is party have been implemented by way of domestic legislation. However, the status of many other international agreements, which have not been the subject of legislative implementating measures, ("non-implemented" international

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provisions which were inconsistent with the terms of such agreement". Similarly, in the Supreme Court, the Court referred to it being common case that, if there was a conflict between the statute and the Convention, it was the terms of the Convention that must prevail: *Murphy (Inspector of Taxes) v. Asahi Synthetic Fibres (Ireland) Ltd.* [1986] IR 777, at 778 and 780.The prevailing character derived from the express statutory provision to that effect and not from any more general principle under which international agreements would prevail over domestic law.

[141] Section 2(1), as amended, provides that the treaties and acts there set out "shall be binding on the State and shall be part of the domestic law thereof under the conditions laid down in the treaties governing the European Union". As originally enacted, the section provided: "From the 1st day of January, 1973, the treaties governing the European Communities and the existing and future acts adopted by the institutions of those Communities shall be binding on the State and shall be part of the domestic law thereof under the conditions laid down in those treaties."

[142] See generally Hogan and Whyte eds, note 137, at para. 5.3.45 *et seq.* As the editors note (at para. 5.3.90), "[s]ave for one isolated and inconclusive instance dealing with abortion [referring to *SPUC v. Grogan* [1989] IR 713], the Irish courts have unhesitatingly acknowledged the supremacy of Community law".

agreements)[143] is governed by Article 29.6, which the Irish courts have been vigilant in enforcing.[144] While many of these operate purely at the international level and do not require any domestic implementation, in a small number of cases, agreements which clearly require, or benefit from, domestic implementation have not, for various reasons, been given effect by the Oireachtas. Although they do not form part of Irish law, such agreements may nonetheless exert a certain influence within the Irish legal system.

i. Status of International Agreements Not Implemented in the Irish Legal System

The effect of Article 29.6, as articulated in the jurisprudence of the Irish courts, is that, unless international agreements are given effect through legislation, they cannot be invoked and applied within the Irish legal system. The context within which the problem of non-implemented international agreements has most frequently arisen has been the European Convention on Human Rights (the Convention or ECHR), which, until the enactment of the Act of 2003,[145] did not form part of Irish law.[146] The basic

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[143] In this section, I use the term non-implemented to describe the position of international agreements which have not been given effect within Irish law in accordance with Article 29.6. It is not intended to suggest the non-implementation of such agreements *as a matter of international law*.

[144] The courts have been so vigilant that they have sometimes policed arrangements which do not even constitute international agreements e.g. the European Prison Rules: *McAlister v. Minister for Justice* [2003] 4 IR 35. According to the Explanatory Memorandum to the Rules, "[w]hilst the rules have no binding legal status in international law, they have been widely recognised as constituting a virtual code of practice in prison administration and treatment. Furthermore, the domestic legal status of the rules, although it varies from country to country, is such that in one form or another they have an important influence on the moral and practical standards that govern prison administration.": see European Prison Rules (Council of Europe, 2006). Another example is the Universal Declaration on Human Rights, a resolution of the United Nations General Assembly and not an international agreement as such: see Application of Woods [1970] IR 154, at 161 (per Ó Dálaigh C.J.): "... the United Nations' Universal Declaration of Human Rights is not part of the domestic law of Ireland: see Article 29, s. 6, of the Constitution and the judgment of this Court in *In re Ó Laighléis*".

[145] While the implementation of the Convention had been debated at an earlier stage (on which, see e.g. Jaconelli, "The European Convention on Human Rights as Irish Municipal Law" (1987) *Ir Jur* 13-27; Report of the Constitution Review Group (Stationery Office, 1996)), it was only following the commitment of the Government "to ensure at least an equivalent level of protection of human rights in both parts of Ireland" (Rights, Safeguards and Equality of Opportunity, para.1) in the context of the Good Friday Agreement, that this ultimately came to pass, at which stage the approach taken by the U.K. was largely followed (albeit with some notable differences): Hogan, "The Belfast Agreement and the Future Incorporation of the European Convention on Human Rights in the Republic of Ireland" (1999) *Bar Review* 205.

[146] The path of the Convention within the Irish legal system has been highly unusual. The Convention was laid before the Dáil in 1953, the year of the State's ratification (which took place on 25th February 1953), but, at that stage, it was not considered that any legislation was necessary in order to give effect to the Convention: 136 Dáil Debates 2031 (4 March 1953). Although the State was the first member state of the Council of Europe to accept the compulsory jurisdiction of the enforcement mechanisms established under the Convention in Strasbourg, it was only with the European Convention on Human Rights Act 2003 that legislation was enacted to give effect to the Convention within the Irish legal system. In the meantime, as explored in the next section, the influence of the Convention in the Irish courts had undergone a considerable degree of evolution.

principles laid down by the Irish courts in respect of the Convention prior to the Act of 2003 retain their validity in respect of other non-implemented agreements. Many, but by no means all, of the well-known examples of such agreements continue to be found in the field of international human rights law. [147]

The seminal case on the status of the Convention in Irish law was *Re Ó Laighléis*,[148] which ultimately became the first case to be decided by the European Court of Human Rights.[149] The applicant sought to impugn his detention under the Offences Against the State (Amendment) Act 1940 on the basis, *inter alia*, that it contravened his right to liberty protected by Article 5 ECHR in circumstances where the 1940 Act, having been the subject of a reference under Article 26 of the Constitution, was immune under Article 34.3.3° from further challenge on constitutional grounds.[150] In the Divisional High Court, after acknowledging that "[c]ounsel for the applicant expressly stated that he was not contending that the Convention had become part of our domestic law" and setting out the provisions of Articles 29.6 and 15.2 of the Constitution, Davitt P. stated the basic rule that "that the Convention, though the State be a party to it, cannot of itself in any way qualify or affect our domestic legislation".[151] This decision was upheld by the Supreme Court. Maguire C.J., for the Court, stated that "the insuperable obstacle to importing the provisions of the Convention for the Protection of Human Rights and

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[147] Again, the most obvious examples are the main United Nations human rights treaties (the International Covenant on Civil and Political Rights and the International Covenant on Social, Economic and Cultural Rights). See the Concluding Observations of the Committee on Economic, Social and Cultural Rights dated 6th May 2002 (E/C.12/1/Add.77), at para. 12: "The Committee notes with regret that, despite its previous recommendation in 1999, no steps have been taken to incorporate or reflect the Covenant in domestic legislation, and that the State party could not provide information on case law in which the Covenant and its rights were invoked before the courts". See the Concluding Observations of the Human Rights Committee established under the ICCPR dated 30th July 2008 (CCPR/C/IRL/CO/3), at para.6: "The Committee notes that, unlike the European Convention on Human Rights, the Covenant is not directly applicable in the State party. In this regard, it reiterates that a number of Covenant rights go beyond the scope of the provisions of the European Convention on Human Rights. The State party should ensure that all rights protected under the Covenant are given full effect in domestic law. The State party should provide the Committee with a detailed account of how each Covenant right is protected by legislative or constitutional provisions".

[148] [1960] 1 IR 93. Note the comment of Kearns J., as he then was, in *Dublin City Council v. Fennell* [2005] 1 IR 604, at 615, describing the case as the "classic statement of the Convention's role in Irish domestic law prior to December, 2003".

[149] See *Lawless v Ireland (No. 1)* (1979-80) 1 EHRR 1; *Lawless v Ireland (No. 2)* (1979-80) 1 EHRR 13; *Lawless v Ireland (No. 3)* (1979-80) 1 EHRR 15. For a detailed consideration of this case, see Doolan, *Lawless v. Ireland (1957-61): the first case before the European Court of Human Rights: an international miscarriage of justice* (Ashgate, 2000).

[150] Article 34.3.3°: No Court whatever shall have jurisdiction to question the validity of a law, or any provision of a law, the Bill for which shall have been referred to the Supreme Court by the President under Article 26, or to question the validity of a provision of a law where the corresponding provision in the Bill for such law shall have been referred to the Supreme Court by the President under the said Article 26.

[151] [1960] 1 IR 93, at 103.

Fundamental Freedoms into the domestic law of Ireland - if they be at variance with that law", was, citing Article 15.2 and Article 29.6, "the terms of the Constitution of Ireland".[152] He continued:

> The Oireachtas has not determined that the Convention of Human Rights and Fundamental Freedoms is to be part of the domestic law of the State, and accordingly this Court cannot give effect to the Convention if it be contrary to domestic law or purports to grant rights or impose obligations additional to those of domestic law.
>
> No argument can prevail against the express command of section 6 of Article 29 of the Constitution before judges whose declared duty it is to uphold the Constitution and the laws.[153]

Maguire C.J. also rejected an argument that the State, having become a party to the Convention, was estopped from relying on domestic law which was alleged to be in conflict with the Convention.[154]

These statements echoed through succeeding decades, followed in a long line of cases concerning the Convention up until the Act of 2003.[155] In the shadow of *Ó Laighléis*, the Irish courts were for some time reluctant to have regard to the Convention and the developing jurisprudence of the European Commission and the European Court of Human Rights in the interpretation and application of Irish law and, on a number of occasions, the Court has found the State to be in violation of the Convention.[156] However, as explored in the next section, the courts have gradually become more receptive to the persuasive influence of the Strasbourg jurisprudence and have drawn upon it increasingly in the development of Irish constitutional jurisprudence even before the enactment of the Act of 2003.

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[152] [1960] 1 IR 93, at 124.
[153] [1960] 1 IR 93, at 124.
[154] [1960] 1 IR 93, at 125: "The Court accordingly cannot accept the idea that the primacy of domestic legislation is displaced by the State becoming a party to the Convention for the Protection of Human Rights and Fundamental Freedoms. Nor can the Court accede to the view that in the domestic forum the Executive is in any way estopped from relying on the domestic law. It may be that such estoppel might operate as between the High Contracting Parties to the Convention, or in the Court contemplated by Section IV of the Convention if it comes into existence, but it cannot operate in a domestic Court administering domestic law".
[155] Among many others, *The State (Sumers Jennings) v. Furlong* [1966] IR 183; *Application of Woods* [1970] IR 154; *Norris v. The Attorney General* [1984] IR 36; *O Domhnaill v. Merrick* [1984] IR 151; *O'B. v. S.* [1984] IR 316; *Desmond v. Glackin (No. 1)* [1993] 3 IR 1; *Fakih v. Minister for Justice* [1993] 2 IR 406; *Wong v. Minister for Justice* [1994] 1 IR 223; *Gilligan v. Criminal Assets Bureau* [1998] 3 IR 185; *Doyle v. An Garda Síochána* [1999] 1 IR 249; *O'Brien v Mirror Group* [2001] 1 IR 1; *Murphy v. G.M.* [2001] 4 IR 113; *People (D.P.P.) v M.S.* [2003] 1 IR 606.
[156] See Chapter 6, Section III.A.i.

Notwithstanding the changed legal landscape in respect of the Convention since 2003, the *Ó Laighléis* line of jurisprudence concerning Article 29.6 continues to be followed in respect of other international agreements. Thus, in *Kavanagh v. Governor of Mountjoy Prison*,[157] Fennelly J., noting that the applicant had not contended for direct effect to be given to the provisions of the International Covenant on Civil and Political Rights, stated:

> The terms of the Covenant have not been enacted into Irish law. They cannot prevail over the provisions of the Offences Against the State Act, 1939, or of a conviction by a court established under its provisions. For the reasons already stated, the views of the Committee cannot be invoked to invalidate that conviction without contravening the terms of Articles 29.6, 15.2.1 and 34.1 of the Constitution.[158]

Similarly, in *N.S. v. Anderson*,[159] O'Higgins J., relying on *Kavanagh*, rejected the argument that Article 31 of the Geneva Convention on the Status of Refugees 1951 had been incorporated into Irish law by the Refugee Act 1996 (an indirectly implementing statute, which scheduled the text of the Convention for convenience of reference).[160]

Thus, in relation to non-implemented, or incompetely implemented, international agreements, there remains the clear danger that Irish law may not in certain respects be compatible with the State's obligations under international law. The terms and effects of Article 29.6 provide no excuse for the failure to fulfil these obligations. The State, and its organs, must ensure respect for these obligations. However, because of the limitation on internal effect imposed by Article 29.6, it is primarily for the political organs – and not the courts – to determine how to ensure that these commitments are respected within the Irish legal system. Nevertheless, while respecting the constitutional constraints, the courts may enable such agreements to have a limited degree of influence or indirect effect, with a view to minimising any potential inconsistency between Irish law and the State's binding but internally non-implemented international obligations, without giving them the force of law.

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[157] *Kavanagh v. Governor of Mountjoy Prison* [2002] 3 IR 97.
[158] [2002] 3 IR 97, at 129.
[159] [2008] 3 IR 417.
[160] [2002] 3 IR 417, at 430. See also *R.G.G. v. D.P.P.* [2008] 3 IR 732 (Article 31, Refugee Convention); *Olaniran v Minister for Justice* [2010] IEHC 83 (United Nations Convention on the Rights of the Child).

ii. Indirect Effects of International Agreements Not Implemented in the Irish Legal System

The main indirect effects recognised by the Irish courts, which will be examined in turn, are the use of non-implemented international agreements as an aid in the interpretation of Irish law, as a constraint on administrative decision-making and as an aid in the determination of the common law, public policy or customary international law.

a. Non-Implemented International Agreements as an Aid in the Interpretation of Irish Law

The most important indirect effect of non-implemented international agreements is as an aid to the interpretation of Irish law. The principle that domestic law should be interpreted, where it is possible to do so, in a manner compatible with international law is widely recognised across legal systems.[161] Also known as a presumption of compatibility,[162] it is a principle of general application, applying to all international law binding on a state whether or not it has been given effect internally. Founded on considerations of "legal policy",[163] this principle reduces the risk of a conflict between domestic and international law which could, if a state were to be held in breach of their international obligations, entail a state's international responsibility. Thus, without directly applying non-implemented international agreements in contravention of Article 29.6, this principle allows the Irish courts to have regard to those agreements and to draw inspiration from them in the interpretation of Irish law. It is important to emphasise that international agreements, when relied upon to this end, are not being given any independent force.

The real utility of this principle lies in the interpretation of provisions of Irish law, which are unclear or ambiguous, and have a range of possible meanings, some of which may be compatible with international law and others incompatible.[164] If the

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[161] See e.g. Betlem and Nollkaemper, "Giving Effect to Public International Law and European Community Law before Domestic Courts: A Comparative Analysis of the Practice of Consistent Interpretation" (2003) 14(3) *EJIL* 569-589.

[162] Hogan and Whyte eds, note 137, at para.5.3.126. See also Bennion, note 62, at 699.

[163] Bennion, note 62, at 698: "It is a principle of legal policy that the municipal law should conform ot public international law. The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle". He continues (at 699): "It is an important principle of public policy to respect the comity of nations, and obey treaties which are binding under public international law", citing Diplock LJ in *Salomon v. Customs and Excise Commissioners* [1967] 2 QB 116, at 143.

[164] See e.g. Diplock LJ in *Salomon v. Customs and Excise Commissioners* [1967] 2 QB 116, at 143: "there is a prima facie presumption that Parliament does not intend to act in breach of international

terms of Irish law are clear and do not admit of a construction which is compatible with international law, the principle is inapplicable.[165] However, the principle is a flexible tool. As Buergenthal has noted, it "gives the courts a great deal of discretion in deciding whether or not to have reference to treaties in interpreting domestic law" and "criteria such as "ambiguous" or "unclear" are subjective and easily manipulated, allowing the courts a great deal of latitude to impose their own preferences for or against the enforcement of the international commitments contained in an unincorporated treaty".[166]

Once again, it is principally within the context of the European Convention on Human Rights that these issues have arisen in the Irish legal system. The special character of the Convention, its overlap with the fundamental rights guarantees of the Irish Constitution, and the effectiveness of its international enforcement mechanism,[167] have all raised difficult questions as to the proper scope of the principle. In the case of many non-implemented international agreements, their usefulness as an aid to interpretation may be considerably more limited.

At the same time as the courts laid down the basic rule in *Ó Laighléis*, they also opened the way, albeit not without equivocation, to the potential indirect or interpretative effect of an international agreement to which the State is party.[168] This

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law, including therein specific treaty obligations; and if one of the meanings that can reasonably be attributed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is so consonant is to be preferred".

[165] Bennion, note 62, at 699, states: "... it is clear that the correct principle is a presumptive one... The prime duty of the courts is to carry out the intention of Parliament. Where Parliament makes it plain that it intends to infringe an international obligation, the court must comply", citing *Collco Dealings Ltd. v. Inland Revenue Commissioners* [1962] AC 1 (where the House of Lords held that the provisions of the Finance Act (No. 2) Act 1955 should prevail over the inconsistent provisions of the UK-Ireland double taxation agreement).

[166] Buergenthal, note 117, at 361.

[167] In respect of the international enforcement mechanism, it has been incisively observed that "domestic courts tend to view treaty obligations, whether incorporated or unincorporated, in a very different light when they know that they do not have the last word when it comes to determining the meaning or relevance of an international agreement" and that "the interaction between national courts and regional courts appears to have had a socialising effect on domestic courts in reducing hostility to and suspicion of international or "foreign" legal norms": Buergenthal, note 117, at 394.

[168] For the Divisional High Court, Davitt P. accepted "the principle, as enunciated by Maxwell, that 'every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations, or with the established rules of international law'": [1960] 1 IR 93, at 102. Nevertheless, Article 29.6 and Article 15.2 set clear limits to this principle of interpretation. "Where there is an irreconcilable conflict between a domestic statute and the principles of international law or the provisions of an international convention", Davitt P. continued, "the Courts administering the domestic law must give effect to the statute": [1960] 1 IR 93, at 103. The Court held that it was not possible to reconcile the Act of 1940 with the provisions of the Convention: [1960] 1 IR 93, at 102-103. However, the position of the Supreme Court was less clear. At one point in its judgment, the Court acknowledged that, having regard to Article 29.6, "this Court cannot give effect to the Convention if it be contrary to domestic law or purports to grant rights or impose obligations additional to those of domestic law", thereby possibly implying that some effect might be given to the Convention insofar as it was not contrary to Irish law. However, the Court later rejected the

ambivalence permeated the Irish case-law on the Convention for a long period of time. Dealing with the law of criminal contempt of court in *The State (D.P.P.) v. Walsh*,[169] Henchy J. recognised that "[t]here is a presumption that our law in this respect is in conformity with the European Convention on Human Rights, particularly articles 5 and 10(2) thereof".[170] However, division remained on the proper use of the Convention in this context, as exemplified by the decision of the Supreme Court in *Ó Domhnaill v. Merrick*.[171] While the core principle was now accepted, the ambivalence as to its application in practice lingered for some time.[172]

However, in later years, as discussed further in Chapter 6,[173] the courts showed an increased openness to the use of the Convention in the interpretation of Irish law. The principle was applied in respect of the common law, in respect of legislation, both domestic and European in origin, and in respect of the Constitution. Indeed, it is in respect of the Constitution that the Convention arguably exercised its greatest influence.

Although this issue has arisen principally within the context of the European Convention, it has also been affirmed in the respect of other international

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contention that "the Act of 1940 is to be construed in the light of, and so as to produce conformity with, a convention entered into ten years afterwards" on the basis that "[t]he intention of the Oireachtas must be sought in the conditions which existed when it became law". See [1960] 1 IR 93, at 125.

[169] [1981] IR 412.

[170] [1981] IR 412, at 440.

[171] [1984] IR 151. Henchy J. stated that "one must assume that the statute was enacted (there being no indication in it of a contrary intention) subject to the postulate that it would be construed and applied in consonance with the State's obligations under international law, including any relevant treaty obligations", although he did not express a concluded opinion on that point because it had not been argued before the Court. See [1984] IR 151, at 159, (followed by McKechnie J. in *Doherty v. Governor of Portlaoise Prison* [2000] IEHC 107). McCarthy J. (dissenting from the decision of the Court), while accepting "as a general principle, that a statute must be construed, so far as possible, so as not to be inconsistent with established rules of international law and that one should avoid a construction which will lead to a conflict between domestic and international law", could not subscribe to "the view that the Statute of Limitations (passed in 1957, four years after the ratification of the Convention, and permitting the commencement of proceedings as I have indicated) is to be limited by the terms of article 6(1) of the Convention": [1984] IR 151, at 166.

[172] For one of the most controversial examples, see *Norris v. A.G.* [1984] IR 36 (where the Court refused to have regard to the then recent decision of the European Court in the case of *Dudgeon v. United Kingdom*): "Neither the Convention on Human Rights nor the decision of the European Court in *Dudgeon v. United Kingdom* is in any way relevant to the question which we have to consider in this case" (per O'Higgins C.J., at 67). See also the dissenting judgment of Henchy J. (at 68-69): "Notwithstanding the submission of the plaintiff's counsel to the contrary, the constitutional question that calls for resolution is unaffected by the fact that the precise statutory provisions in question in this case were held by the European Court of Human Rights in *Dudgeon v. United Kingdom* to be in breach of article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. That Convention, as has been held by this Court, although it has by its terms a binding force on the Government of this State as one of its signatories, forms no part of the domestic law of this State. Moreover, article 8 of the Convention has no counterpart in our Constitution."

[173] See Chapter 6, Section III.A.ii.

agreements: sometimes expressly, as in the case of the Refugee Convention[174] and the UN Convention on the Rights of the Child;[175] sometimes implicitly as in the case of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[176] the Convention on the Arrest of Sea-going Vessels,[177] and UK-Ireland double taxation agreements.[178] Indeed, in the interpretation of treaties, the courts have long had recourse to the principles of interpretation laid down in the Vienna Convention on the Law of Treaties, which the State only ratified in 2006 and which has not been given effect in Irish law.[179]

b. Non-Implemented International Agreements as a Constraint on Administrative Decision-Making

International agreements binding the State, notwithstanding that they have not been implemented into Irish law, may also act as a constraint on administrative decision-making, an indirect effect which has gained prominence in common law jurisdictions in recent decades. In the Irish jurisprudence, it has generally arisen within the context of a plea of legitimate expectation.[180]

In *Fakih v. Minister for Justice*,[181] the applicants, who were Lebanese asylum-seekers, sought to prevent their deportation until their applications for refugee status had been determined in accordance with the terms of a letter of the 13th December, 1985 from the Department of Justice to the United Nations High Commissioner for Refugees, which stated that Ireland would implement the UNHCR's suggested procedures for applications for refugee status and asylum (the von Armin letter). At the time, the State had long since ratified the Refugee Convention[182] but, as was accepted by the applicants, had not yet given effect to its terms in Irish law by way of implementing legislation (which would follow in the

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[174] *N.S. v. Anderson* [2008] 3 IR 417, at 427.
[175] *N. v. Minister for Justice* (Unreported, High Court, Finlay Geoghegan J., 31st October, 2003).
[176] *Broström Tankers AB v. Factorias Vulcano SA* [2004] 2 IR 191, at 197 where Kelly J. rejected the defendant's challenge to the enforcement of a foreign arbitration award on the ground of public policy under the New York Convention (given effect to under the Arbitration Act 1980): "I am satisfied that a broad interpretation, such as is contended for by the defendant, would defeat the Convention's purpose of permitting parties to international transactions to promote neutral dispute resolution".
[177] *The Marshal Gelovani* [1995] 1 IR 159; *The Kapitan Labunets* [1995] 1 IR 164.
[178] *Murphy (Inspector of Taxes) v. Asahi Synthetic Fibres (Ireland) Ltd.* [1985] IR 509.
[179] See *McGimpsey v. Ireland* [1988] IR 567; *Kinsella v. Revenue Commissioners* [2008] 1 ILRM 337.
[180] In *Kavanagh v. Governor of Mountjoy Prison* [2002] 3 IR 97, Fennelly J. commented (at 127) that "the principle of respect for legitimate expectation ...can be confidently defined as a rule applicable, *ratione materiae*, to the decision-making process"; it was "novel and as yet not fully explored".
[181] [1993] 2 IR 406.
[182] Ireland acceded to the Convention relating to the Status of Refugees on 29 November 1956 and to its Protocol on 6 November 1968.

Refugee Act 1996).[183] However, the applicants relied on the contents of the von Armin letter "as giving rise to a legitimate expectation on the part of all persons to whom its contents might be regarded as applying, that the procedures therein set forth would be followed in examining their cases, and that the intervention of the High Court may be sought to restrain any departure from those agreed procedures".[184] After analysing a range of Irish and Commonwealth authorities, O'Hanlon J. concluded that "the same obligation to follow fair procedures in dealing with the question of the removal of the applicants from the jurisdiction arises in their favour and that the mode of procedure to be adopted should have regard to the assurances given by the Minister for Justice to the U.N.H.C.R. representative in the letter of the 13th December, 1985".[185] He emphasised that "the legal status of the applicants, or the question of their legal entitlement to remain in Ireland, are not governed in any way by the terms of the letter and that it is of benefit to the applicants only in relation to the manner in which their claims to rights of asylum are to be processed"; "having regard to the terms of that letter, once a claim to asylum is put forward on behalf of aliens coming to this country, the person or persons concerned should be given an adequate opportunity to put forward representations to show why such application should be acceded to".[186] On this basis, the Court restrained the Minister from removing any of the applicants from the jurisdiction pending the consideration of their applications in accordance with this procedure and directed the Minister "to consider the application of each of the applicants for refugee status as defined in accordance with the United Nations Convention on the Status of Refugees as amended by the Protocol on the Status of Refugees of 1967, and subject to any further international agreement or understanding affecting the application of these instruments".[187] In *Gutrani v. Minister for Justice*,[188] O'Hanlon J. made a similar finding. On appeal to the Supreme Court, which upheld the decision of the High Court, McCarthy J. commented:

> The Minister does not contest that he is obliged to consider the application within the framework of the letter of the 13th December, 1985. Having

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[183] [1993] 2 IR 406, at 417. Thus, O'Hanlon J. noted that it was "accepted by the applicants that neither the 1951 Convention nor the 1967 Protocol on the Status of Refugees forms part of the domestic law of the State, notwithstanding that they have been adopted by the State as part of our obligations under international law".
[184] [1993] 2 IR 406, at 418.
[185] [1993] 2 IR 406, at 424.
[186] *Ibid.*
[187] [1993] 2 IR 406, at 425.
[188] [1993] 2 IR 427.

> established such a scheme, however informally so, he would appear to be bound to apply it to appropriate cases, and his decision would be subject to judicial review. It does not appear to me to depend upon any principle of legitimate or reasonable expectation; it is, simply, the procedure which the Minister has undertaken to enforce.[189]

Thus, while there was a divergence of views as to its proper characterisation – legitimate expectation in the opinion of O'Hanlon J. and fair procedures in that of McCarthy J. – there was no dispute about the entitlement of the applicants to this procedural protection. The courts thereby recognised that a non-implemented international agreement may serve as a constraint on administrative decision-making.

However, there are a number of limitations inherent in these decisions: first, the protection afforded to the applicants was merely procedural; secondly, it was not the ratification of the Convention which gave rise to the legitimate expectation but the State's express commitment to the UNHCR in the von Armin letter to follow certain procedures so as to give effect to the Convention internally (an unusual step with few analogies in respect of other international agreements); thirdly, it applied in circumstances where there was no domestic legislation governing the procedure to be adopted.[190]

These limitations become clear when considering the further cases in which a plea of legitimate expectation has been raised in respect of a non-implemented international agreement. In *Kavanagh v. Governor of Mountjoy Prison*,[191] the applicant, who had been convicted of a number of offences before the Special Criminal Court, submitted a communication to the Human Rights Committee in accordance with the Optional Protocol to the International Covenant on Civil and Political Rights on the basis of which the Committee concluded that the State had failed to respect the applicant's right to equality before the law under Article 26 of the Covenant because it had failed to demonstrate that the decision to try the applicant before that Court was based on reasonable and objective grounds. On this basis, the applicant sought leave to apply for judicial review in order to *inter alia* quash his conviction and argued that the State's accession to the International Covenant on Civil and Political Rights and ratification of its Optional Protocol created a legitimate expectation that "the State would respect the terms of the

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[189] [1993] 2 IR 427, at 435-436.

[190] Since the coming into force of the Refugee Act 1996, there has been a statutory basis for the procedures for assessment of refugee status in accordance with the 1951 Convention and its Protocol.

[191] *Kavanagh v. Governor of Mountjoy Prison* [2002] 3 IR 97.

Covenant itself in its substance and, more particularly, that it would take steps to give effect to the views of the Committee",[192] which steps "might extend to or include an application by the third respondent to the second respondent to have the conviction quashed".[193] Thus, the breadth of the claim being made on the basis of a legitimate expectation in this case stood in sharp contrast to the more limited claims made in *Fakih* and *Gutrani*. In the course of its analysis of this argument, the Supreme Court considered the well-known cases of *Tavita v. Minister of Immigration*[194] and *Minister of State for Immigration and Ethnic Affairs v. Teoh.*[195] Fennelly J. stated that it could be "accepted without deciding that such decision makers should pay due regard to such instruments" but emphasised that it was "the particular form of legitimate expectation" which had to be considered.[196] The principle was founded on procedural fairness and this was all that it guaranteed.[197] In this regard, Fennelly J. cited the joint judgment of Mason C. J. and Deane J. in *Teoh*, which described "the difference between a legitimate expectation and a binding rule of law" as being that "the existence of a legitimate expectation that a decision-maker will act in a particular way does not necessarily compel him or her to act in that way". [198] In the context of the case before the Court, Fennelly J. said the applicant was seeking an order quashing his conviction, "substantive relief of a far-reaching kind", which claim seemed "greatly to exceed the reach of the doctrine of legitimate expectation, however generously it might be extended".[199] To compel decision-makers to act in a particular way, on the basis of that doctrine, would, echoing the words of Mason C.J. and Deane J., be to incorporate "the unincorporated Convention....by the back door".[200] The terms of the Covenant, not having been

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[192] [2002] 3 IR 97, at 122.
[193] [2002] 3 IR 97, at 123.
[194] *Tavita v. Minister of Immigration* [1994] 2 NZLR 257.
[195] *Minister for State for Immigration and Ethnic Affairs v. Teoh* (1994-1995) 183 CLR 273.
[196] [2002] 3 IR 97, at 127.
[197] [2002] 3 IR 97, at 127-128: "...Where the State is involved, it should be assumed for present purposes that all makers of administrative decisions may come within its scope once the State itself has adopted a relevant position in the international sphere. On that hypothesis, decision-makers should not be allowed to disappoint expectations which they have themselves created and which are reasonably entertained by those within the purview of the powers they exercise. Why, one asks? The simple almost naive answer is that it would be unfair. ... Moreover, the doctrine of legitimate expectation does not, in the normal course of events, guarantee anything more than procedural fairness...". However, Fennelly J. continued (at 128): "Depending on circumstances, it is conceivable that application of the doctrine will have the effect of conferring substantive rights, but that will necessarily be an indirect consequence. The decision-maker, confronted with the duty to take created expectations into account may find it difficult or even impossible credibly to reject an application for a particular result".
[198] (1994-1995) 183 CLR 273, at 291.
[199] [2002] 3 IR 97, at 128.
[200] [2002] 3 IR 97, at 129.

implemented in Irish law, could not prevail over the provisions of domestic legislation (in that case, the Offences Against the State Act 1939) or over a "conviction by a court established under its provisions".[201] Thus, while the Supreme Court confirmed that there could in principle be a legitimate expectation that decision-makers should take non-implemented international agreements, such as the Covenant, into account when making decisions in areas potentially affected by them,[202] it categorically rejected the extremely broad claim of the applicant founded on that doctrine. In a number of other cases, the High Court has also rejected similar arguments founded in the doctrine of legitimate expectation.[203] Thus, while it has been accepted in principle that non-implemented international agreements may act as a constraint upon administrative decision-making (such as by giving rise to a

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[201] *Ibid.*

[202] In terms of the characterisation of that principle, it is interesting to note that the Court expressly uses the language of legitimate expectations, as was earlier used by the High Court in *Fakih*, although it makes clear that it basis lies essentially in fundamental fairness, as McCarthy J. had emphasised in *Gutrani*.

[203] In *McAlister v. Minister for Justice* [2003] 4 IR 35, the applicant claimed a legitimate expectation that the Minister, in considering an application for temporary release, would had regard to the European Prison Rules. Rejecting this argument, Finnegan J. (at 43) observed that the Supreme Court, in *Kinahan v. Minister for Justice* [2001] 4 IR 454, had held that these rules, which constituted "certain recommendations of the Committee of Ministers of the Council of Europe to which Ireland was a party", were not binding. Citing Article 29.6, he concluded that "[t]o allow the adherence of the State to an international agreement to create a legitimate expectation would be to admit such an agreement into the domestic law of the State by the back door and to ignore the constitutional prohibition". As noted earlier, the Rules were not strictly speaking an "international agreement" within the meaning of Article 29.6. In *N.S. v. Anderson* [2008] 3 IR 417, the applicant contended that, because Ireland was a signatory of the Refugee Convention, she "had a legitimate expectation that the protection of article 31 of the Convention would be afforded to her, and that she would not be subject to a penalty i.e. criminal prosecution". The respondents argued that a legitimate expectation of a particular course of action could not arise where legislation clearly provided for a different course of action, that the Director of Public Prosecutions was charged by law with certain functions (including prosecution of offences under the Criminal Justice (Theft and Fraud Offences) Act), that the doctrine could not prevent the Director from discharging those functions and could not be used to import the provisions of Article 31 of the Geneva Convention 1951 into Irish law in the absence of legislation by reason of Article 29.6. Having considered the case of *Kavanagh*, O'Higgins J. (at 430) stated that the Court was prepared "to assume that the State may, by entering into an international agreement, create a legitimate expectation that its agencies will respect its terms". However, it could not accept such an obligation "so as to affect either the provisions of a statute or the judgment of a court without coming into conflict with the Constitution". O'Higgins J. continued (at 431-432): "To allow the doctrine to enable the applicant a legitimate expectation to avail of article 31 of the Geneva Convention 1951 would, in my view, be a usurpation by the courts of the power of the legislature. It would clearly amount to incorporating the provisions of "the unincorporated convention into our municipal law by the back door..... in default of legislation enacting the provisions of article 31 of the Geneva Convention 1951 into Irish law, the ratification of the Convention does not confer rights on the applicants which may be invoked before the courts, at least to deprive the Director of Public Prosecutions of his functions as laid down by law". In *R.G.G. v. D.P.P.* [2008] 3 IR 732, and *Siritanu v. D.P.P.* [2006] IEHC 26, the High Court was faced with similar arguments. In *R.G.G.*, Gilligan J. (at 741) emphasised the point made by O'Higgins J. in *N.S.* that "in this case, the legitimate expectation in contention conflicts not only with statute, but also with Article 30 of the Constitution".

legitimate expectation), the import and appropriateness of such a plea may be very limited in practice.[204]

c. *Non-Implemented International Agreements as an Aid in the Determination of the Common Law, Public Policy or Customary International Law*

In addition to serving as an aid to the interpretation of Irish law, in certain circumstances, international agreements, although not part of Irish law, may assist in determining the state and scope of the common law or the public policy of the State. In the case of *Desmond v. Glackin (No. 1)*,[205] in the context of contempt of court, O'Hanlon J. stated:

> As Ireland has ratified the [ECHR] and is a party to it, and as the law of contempt of court is based (as was stated by Lord Reid) on public policy, I think it is legitimate to assume that our public policy is in accord with the Convention or at least that the provisions of the Convention can be considered when determining issues of public policy. The Convention itself is not a code of legal principles which are enforceable in the domestic courts, as was made clear in *In re Ó Láighléis* [1960] I.R. 93, but this does not prevent the judgment of the European Court of Human Rights from having a persuasive effect when considering the common law regarding contempt of

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[204] In other areas of administrative law, the State's international human rights commitments may also have a role to play. For example, in the context of judicial review of administrative decisions affecting fundamental rights on the grounds of unreasonableness, the recent decision of the Supreme Court in the *Meadows v. Minister for Justice* [2010] IESC 3 indicates that the State's international human rights commitments, or in any event the ECHR as given effect in the Act of 2003, may have an important role to play: see e.g. judgment of Fennelly J., at para. 69: "Where unreasonableness is alleged, the applicant will ask the court to examine the decision to see whether the decision-maker has complied with the duty to take account of and to give due consideration to any relevant rights or interests. There is an infinitely broad spectrum of decisions and of contexts and an infinite gradation of rights. There are constitutional rights, statutory and other legal rights, rights guaranteed by the Convention. In the last case, it is relevant that section 3 of the European Convention of Human Rights Act, 2003 places an obligation on every organ of the State to perform its functions in a manner compatible with the State's obligations under the provisions of the Convention. In the Convention context, we must be conscious that the Court of Human Rights is influenced by the effectiveness of legal remedies against administrative decisions, when it considers the effectiveness of a national remedy pursuant to Article 13." The influence of the ECHR can be seen in the terminology employed by the Court e.g. the following passage from the judgment of Murray CJ: "I am of the view that the principle of proportionality is a principle that may be applied for the purpose of determining whether, in the circumstances of a particular case, an administrative decision may properly be considered to flow from the premises on which it is based and to be in accord with fundamental reason and common sense. In applying the principle of proportionality in this context I believe the Court may have regard to the degree of discretion conferred on the decision-maker. In having regard to the degree of discretion a margin of appreciation should be allowed to the decision-maker in choosing an effective means of fulfilling any legitimate policy objectives."

[205] [1993] 3 IR 1.

court in the light of the constitutional guarantees of freedom of expression contained in our Constitution of 1937.[206]

Similarly, in *Brennan v. DPP*,[207] the Convention was recognised as being an influential guide to public policy.[208] Furthermore, as discussed in Chapter 4,[209] non-implemented international agreements may also assist in determining the nature, scope and effect of rules of customary international law.[210]

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As a means of alleviating the clear tension between the binding effect of international agreements in international law and their non-implementation in Irish law, the Irish courts have recognised that non-implemented international agreements may have certain indirect effects on Irish law. Although these effects are necessarily constrained by the provisions of Article 29.6, they may nonetheless be influential, even in matters of Irish constitutional law, as the case of the ECHR demonstrates. However, the extent to which non-implemented international agreements may exercise influence in this way very much depends not only on the nature of the international agreement (the ECHR being exceptional in many respects) but also on the attitude of the courts towards international law generally. As the courts become increasingly open to international law, the potential influence increases and so too does the role of the courts in ensuring, in so far as possible to do so within the constitutional constraints imposed by Article 29.6, that the organs of the State, including the courts themselves, respect the State's binding international obligations.

D. Assessment

Article 29.6 of the 1937 Constitution lays down a clear rule excluding international agreements from taking direct effect within Irish law. It is for the Oireachtas, vested with "the sole and exclusive power of making laws for the State" to determine what effect, if any, an international agreement has in Irish law. When the Constitution Review Group conducted its general review of the 1937 Constitution in the mid-

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[206] [1993] 3 IR 1, at 28-9.
[207] [1999] 1 ILRM 190.
[208] See also, in the context of an agreement given effect in Irish law, *Broström Tankers AB v. Factorias Vulcano SA* [2004] 2 IR 191 (construing the public policy exception under the New York Convention).
[209] Chapter 4, Section III.E.
[210] See Chapter 4, Section III.E. One of the most obvious examples is the reliance on the principles of interpretation under the Vienna Convention on the Law of Treaties prior to the State's ratification and in the absence of any implementing legislation.

1990s, it noted in its Report that it was "not aware of suggestions for change in Article 29.6 although there have been suggestions that particular agreements, notably human rights instruments, should be made part of domestic law".[211] This remains an accurate summary of the position. The practice of the Oireachtas in this sphere has not been without its flaws: it may validly be criticised for not taking a more proactive role in scrutinising the Government's exercise of the treaty-making power and its implications for Irish law and for occasionally failing to take, or at least delaying in taking, the necessary action to give full effect to an international agreement within Irish law, particularly in the field of international human rights law. At the same time, it is important to recognise that the implementation of international agreements is a complex process, particularly in fields such as human rights where the relationship between internationally guaranteed rights and constitutionally enshrined fundamental rights must be satisfactorily worked out. The high volume of international agreements places a considerable burden on the workload of the Oireachtas. However, even a brief examination of the extensive and diverse legislative practice in this area shows that generally speaking Article 29.6 has not prevented the State from complying with its obligations under the international agreements by which it is bound. On the whole, the system of which Article 29.6 forms part enables the State to comply with its international obligations while at the same time respecting its fundamental constitutional principles and the constitutionally enshrined separation of powers.

Moreover, even in cases where Article 29.6 precludes international agreements from forming part of Irish law, the Irish courts have recognised that such agreements, which bind the State as a matter of international law, may have certain indirect effects and influence in Irish law. In this context, where so much depends on judicial attitudes and the wider legal culture, recent years have witnessed a

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[211] Report of Constitution Review Group, note 45, "Article 29", Issue 9. The Review Group nonetheless recounts the arguments, first, in favour of amendment which include that "in all cases relating to international agreements their actual terms could be invoked in our courts in support of claims" rather than the provisions of implementing domestic legislation and a monist approach "would obviate the delay which occurs while the State is enacting implementing legislation" and, secondly, against amendment which include that "many international agreements have very little or no impact internally and it would be superfluous to have them as part of domestic law", that the Government is given "valuable flexibility as to the most appropriate way to implement an international agreement, not excluding making it part of domestic law" which has, broadly speaking, "worked well in Ireland", and a monist approach "bypass the Oireachtas, thus effectively allowing the executive to legislate by ratifying international agreements and effectively make domestic law by negotiating a treaty, which would be a radical change in our legal system". In the circumstances, the Group made no proposal for the amendment of Article 29.6 and the All-Party Oireachtas Committee on the Constitution agreed that no change was necessary in its *Eighth Progress Report: Government* (Stationery Office, 2003), at 36.

discernible improvement in the level of openness to international law in the Irish legal system. In light of this increased openness, it is clear that international agreements, whether or not they have been specifically given effect in Irish law, will continue to have a significant influence on the development of the Irish legal system. However, as the following section examines, in understanding the implementation of international agreements within the Irish legal system, both now and into the future, the increasing role of the European Union in this process must be taken fully into account.

IV. IMPLEMENTATION IN THE EUROPEAN UNION LEGAL SYSTEM

As the European Union's external activity, including its treaty-making, has intensified, the implementation of international agreements within the EU legal system, and its effects on the legal systems of Member States, have come increasingly to the fore.[212]

A. The Status of International Agreements within the European Union Legal System: the Basic Principles

The effect of international agreements within the EU legal system is now governed by Article 216(2) TFEU[213] which provides that:

> Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.

As Eeckhout remarks, this is "first of all an expression of the vital international law principle of *pacta sunt servanda*".[214] It goes without saying that, as a matter of international law, international agreements concluded by the Union are binding upon the Union. However, the Union is composed of, and acts through, its institutions and its Member States and the significance of this provision is in its expression of the binding effect of the Union's international agreements on its institutions and its Member States as a matter of European Union law.[215]

While Article 216(2) TFEU articulates an important statement of principle, it makes no express reference to the internal status of international agreements within

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[212] The literature on this topic is extensive. For recent general examinations with references to the older literature, see Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford, 2004), Chapter 9; Koutrakos, *EU International Relations Law* (Hart Publishing, 2006), Chapters 5-8; Kaddous, "Effects of International Agreements in the EU Legal Order" in Cremona and de Witte eds, *EU Foreign Relations Law: Constitutional Fundamentals* (Hart Publishing, 2008); Jacobs, "Direct effect and interpretation of international agreements in the recent case law of the European Court of Justice" in Dashwood and Maresceau eds, *Law and Practice of EU External Relations* (Cambridge University Press, 2008); Tietje, "The Status of International Law in the European Legal Order: The Case of International Treaties and Non-binding International Instruments", in Wouters, Nollkaemper and de Wet eds, *The Europeanisation of International Law: the Status of International Law in the EU and its Member States* (TMC Asser Press, 2008); Lavranos, *Legal Interaction between Decisions of International Organizations and European Law* (Europa, 2004), Chapter 2; Cheyne, "Haegeman, Demirel and their Progeny" in Dashwood and Hillion eds, *The General Law of E.C. External Relations* (Sweet & Maxwell, 2000); Cremona, "External Relations of the EU and the Member States: Comeptence, Mixed Agreements, International Responsibility and the Effects of International Law", in X. Xenopoulous (ed), *FIDE 2006 National Reports* (FIDE, 2006), at 319; Mendez, "The Legal Effect of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques" (2010) *Eur J Int'l L* 83.

[213] Formerly Article 300(7) EC.

[214] Eeckhout, note 212, at 276.

[215] *Ibid.*

the EU legal system. Yet, since its decision in the *Haegeman* case in 1974,[216] the Court of Justice has consistently affirmed that from the time they come into force international agreements "form an integral part of Community Law".[217] The Court considered the then Community's international agreements to be "acts of the institutions", thereby conferring upon it jurisdiction to give preliminary rulings on their interpretation[218] and to ensure that agreements are applied uniformly and effectively throughout the Community.[219] Moreover, because international agreements concluded by the Union automatically formed part of its law upon their coming into force, "no particular act of transposition or implementation [was] required apart from those which lead to the conclusion of the agreement".[220] Consequently, this can be read as a confirmation of a "monist approach towards international law",[221] although, as an examination of the case-law makes clear, such a classification must be viewed with caution.[222] Nonetheless, it is crucial to stress that the starting point for the implementation of international agreements within the EU legal system is fundamentally different to that which prevails in the Irish legal system by virtue of Article 29.6 of the 1937 Constitution.

In terms of their hierarchical rank within the EU legal system, international agreements occupy an intermediate status between the EU's primary law, the European Treaties, and its secondary law in the form of its Regulations, Directives and other legislative measures.[223] On the one hand, international agreements must be concluded in accordance with the Treaties; if they are not, their conclusion could be precluded by an adverse opinion of the Court[224] or could be invalidated as a result of an action for annulment.[225] On the other hand, the Court has repeatedly made clear

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[216] Case 181/73 *Haegeman* [1974] ECR 449.

[217] See e.g. C-160/09 *Katsivardas* (Judgment of 20 May 2010, not yet reported); Case C-533/08 *TNT Express Nederland* (Judgment of 4 May 2010, not yet reported); Case C-431/05 *Merck Genéricos – Produtos Farmacêuticos* [2006] ECR I-7001.

[218] Case 181/73 *Haegeman* [1974] ECR 449, paras. 4-6.

[219] Case 104/81 *Kupferberg* [1982] ECR 3641, para. 14.

[220] Pescatore, "Treaty-making by the European Communities" in Jacobs and Roberts eds, note 36, at 178; see also Eeckhout, note 212, at 277.

[221] See Lenaerts and Van Nuffel, note 6, Eeckhout, note 212, at 277 and Kaddous, note 212, at 293.

[222] Thus, as Eeckhout notes, at 277, it is "not convincing to consider that the Treaty drafters intended international agreements to have [direct effect]" and current Article 216(2) TFEU "does not describe the legal consequences or effects..". Similarly, Kaddous concludes her survey of the case law by observing "how difficult it is to classify the EU as a monist or dualist system": Kaddous, note 212, at 312.

[223] See e.g. Lavranos, note 212, at 24, referring to the "general opinion in the legal literature [which] assumes that international treaties are placed between primary and secondary EC law with the result that they prevail over conflicting secondary EC law but not over primary EC law (the EC Treaty)".

[224] See e.g. Opinion 2/94 *(Accession to the ECHR)* [1996] ECR I-1759.

[225] See e.g. Case C-360/93 *Parliament v. Council* [1996] ECR I-1995 and Case C-317/04 and C-318/04 *Parliament v. Council* [2006] ECR I-4721.

that international agreements, properly concluded, prevail over any inconsistent secondary legislation.[226] In terms of the status of international agreements concluded by the EU vis-à-vis the law of Member States, by virtue of the principle of supremacy of EU law, such international agreements would prevail over any conflicting provisions of the law of Member States such as Ireland. As Lavranos puts it, "as a result of the fact that international treaties are an integral part of the Community legal order, they also enjoy primacy over all national law, including constitutional law, of the EU Member States".[227] Thus, in this extremely important respect too, the position of international agreements within the EU legal system, and by extension within the legal systems of Member States within the scope of EU law, diverges from that which prevails under the 1937 Constitution.

In further contrast to Article 29.6 of the 1937 Constitution, the internal status and effect of international agreements is not explicitly laid down in the Treaties. Instead, it has been defined by the Court of Justice based on the scheme implicit in the Treaties. As with Article 29.6, the institutional allocation of powers plays an important role in understanding the approach taken in the EU legal system. However, in contrast to many of the constitutions of Member States, the Treaties do not provide for a clear-cut separation of powers between the executive and the legislative organs of government generally or in the field of external relations.[228] Moreover, the allocation of power must be understood not only in the context of the horizontal division of power among the EU institutions but also in the context of the vertical division of power between the EU and its Member States. From this vertical perspective, it is significant that the Council, the institution comprised of the representatives of Member States, plays a primary role in treaty-making. Although the Commission may make recommendations for the opening of negotiations and will often conduct the negotiations in relation to an international agreement, it is the Council which decides upon the opening of negotiations, which may issue directives

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[226] See e.g. Case C-344/04 *IATA*, para.35; Case C-286/02 *Bellio F.lli* [2004] ECR I-3465, at para.33; Case C-61/94 *Commission v. Germany* [1996] ECR I-3989, at para.52. Most recently, see Case C-228/06 *Soysal and Savatli* [2009] ECR I-1031, discussed below at 159. However, it is apt to recall the comments of the Court of Justice in *Kadi* on this issue. Primacy of international agreements over secondary legislation "would not however extend to primary law, in particular to the general principles of which fundamental rights form part": Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] ECR I-6351, at para.308.

[227] Lavranos, note 212, at 24.

[228] "Many [legislative, executive, administrative, and judicial] duties are shared between institutions, thereby rendering it impossible to describe any one of them as the sole legislator or the sole executive. The Community does not therefore conform to any rigid separations-of-power principle of the sort that has shaped certain domestic political systems": Craig and de Búrca, *EU Law: Text, Cases and Materials* (4th ed, Oxford University Press, 2008), at 38.

to the negotiators, and which decides whether to sign and to conclude agreements. From the horizontal perspective, a central issue is the extent to which the institutions charged with law-making in a particular field are also involved in treaty-making in that field. If such institutions have a role in the treaty-making process, it is more legitimate for international agreements, upon their conclusion, to take effect automatically as part of the legal system.[229] For a long time, the secondary role of the European Parliament in this sphere raised legitimate concerns about a lack of democratic controls over EC and EU treaty-making,[230] akin to those underpinning Article 29.6 in the Irish Constitution, echoing concerns in relation to EU law-making generally, which have been gradually addressed by a series of revisions of the Treaties, culminating in the Treaty of Lisbon. The Treaties now require the consent of the European Parliament in respect of important international agreements – namely, association agreements, accession to the ECHR, agreements establishing institutional frameworks, with important budgetary implications, and, perhaps most significantly, in areas where the ordinary legislative procedure (or the special legislative procedure requiring the Parliament's consent) applies – and its consultation in other cases.[231] This continues the expansion of the role of the European Parliament in the legislative process within the European Union and represents a particularly significant advance in its role in external relations, the practical consequences of which can be seen in the Parliament's initial rejection of EU-US 'SWIFT' Agreement.[232] Yet for many years, even in the absence of such parliamentary control over treaty-making, international agreements were recognised as having effects within the EU legal order.

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[229] See Pescatore, note 220, at 297.

[230] See Eeckhout, note 212, at 188-189, critiquing the lack of parliamentary involvement in the treaty-making process.

[231] See Chapter 2, Section III.C.

[232] The Parliament initially refused to approve the SWIFT agreement, which dealt with banking data transfers to the USA, because of concerns about privacy, proportionality and reciprocity. See 'SWIFT: European Parliament votes down agreement with the US' (European Parliament Press Release, 11 February 2010) available online at http://www.europarl.europa.eu/sides/getDoc.do?language=en&type=IM-PRESS&reference=20100209IPR68674 (last accessed 12 May 2011). However, after further safeguards were introduced, the Parliament approved the agreement: see 'Parliament gives green light for SWIFT II' (European Parliament Note, 10 February 2010) available online at http://www.europarl.europa.eu/sides/getDoc.do?language=en&type=IM-PRESS&reference=20100625FCS76850#title17 (last accessed 12 May 2011). Another example of the increased assertiveness of the Parliament in the field of external relations is its legal challenge to the regulations implementing the UN sanctions regime against Usama Bin Laden, Al-Qaeda and the Taliban, which it argues should have been adopted on the basis of Article 75 TFEU (which requires the Parliament's approval, coming under the ordinary legislative procedure) rather than Article 215 TFEU (which merely requires that the Parliament is informed): see Case C-130/10 *Parliament v. Council* (pending).

What is most different and distinctive at the EU level is the extent to which the judicial vision of the EU legal system has shaped the approach taken to the implementation of international agreements. The approach of the Court of Justice may be seen as reflecting certain characteristics of the European Union: first, although it defined itself in contrast to traditional international law, it nevertheless remained the case that the foundations of the Communities and now the Union were firmly to be found in international law;[233] secondly, the influence of the legal heritage and culture of the Member States, particularly the founding Member States, was significant, many of which took some form of monist approach to international agreements;[234] thirdly, and most importantly, the logic underpinning the approach of the Court to the Treaties themselves and to the secondary law of the EU equally applied with some force to the international agreements of the EU. As Eeckhout has observed, "the task of discovering and determining [the effects of international law] has fallen almost exclusively on the Court of Justice" and "its case law in this area is very much the counterpart of the case law on the direct effect and supremacy of the Treaties and of internal legislation, the defining features of European constitutionalism".[235]

Although the basic principles laid down by Article 216(2) TFEU and the *Haegeman* jurisprudence have long been accepted, they do not fully resolve questions relating to the effect and implementation of international agreements within the EU legal system. Frequently, implementation will require action not only at the EU level but also at the level of Member States. In light of the potential difficulties to which this may give rise, the Court of Justice has adopted a very broad approach to its jurisdiction in the interpretation of international agreements, emphasising the importance of uniformity in the application of the law. The Court's decision in *Kupferberg* is useful in understanding this approach.[236] In its judgment, the Court stated that the "measures needed to implement the provisions of an agreement concluded by the Community" were to be adopted "according to the state of Community law for the time being in the areas affected by the provisions of the agreement either by the Community institutions or by the Member States".[237]

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[233] See Pellet, "Les fondements juridiques internationaux du droit communautaire" in *Collected Courses of the Academy of European Law* (Vol. V, Book 2, 1994).
[234] See Eisemann (ed), note 4, *passim*.
[235] Eeckhout, note 212, at 342. See also Mendez, "The Legal Effect of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques" (2010) 21 *EJIL* 83, at 86-87.
[236] Case 104/81 *Kupferberg* [1982] ECR 3641.
[237] *Ibid.*, at para.12.

Critically, the Court stated that, in ensuring respect for commitments arising from a Community agreement, "the Member States fulfil an obligation not only in relation to the non-member country concerned but also and above all in relation to the Community which has assumed responsibility for the due performance of the agreement", which is why such agreements formed an integral part of Community law.[238] It followed from the "Community nature of such provisions" that their effect "may not be allowed to vary according to whether their application is in practice the responsibility of the Community institutions or of the Member States and, in the latter case, according to the effects in the internal legal order of each Member State which the law of that State assigns to international agreements concluded by it".[239] The last passage clearly envisages the possibility of discrepancies among Member States according to their relative monist or dualist approaches to international law. As a result of these considerations, the Court concluded that it was for it, within the framework of its jurisdiction interpreting the provisions of agreements, "to ensure uniform application throughout the Community".[240] Two important aspects of this decision bear emphasis: first, the obligations for Member States *under EU law* to which international agreements may give rise; secondly, the Court's strong attachment to uniformity in the interpretation and application of international agreements where the EU is affected.

B. The Implementation of Mixed Agreements in the European Union Legal System

If implementation of pure EU agreements can give rise to certain difficulties, then the implementation of mixed agreements poses even greater challenges for the EU legal system. As discussed in Chapter 2, a striking feature of the practice in the field of external relations is the complex and often confusing allocation of power between the Union and its Member States, which is epitomised in the phenomenon of mixed agreements i.e. international agreements concluded both by the Union and Member States.[241] Both the Union and its Member States must comply with their internal constitutional procedures in the conclusion of mixed agreements. As parties to mixed agreements, both the Union and its Member States are bound by their provisions. It is

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[238] *Ibid.*, at para.13.
[239] *Ibid.*, at para.14.
[240] *Ibid.*
[241] See generally Hillion and Koutrakos eds, note 263, and Heliskoski, *Mixed agreements as a technique for organizing the international relations of the European Community and its member states* (Kluwer Law International, 2001).

prima facie for each legal system to determine what internal effect mixed agreements have: in certain legal systems, such agreements may take effect as part of the law upon their conclusion; in others, such as the Irish legal system, positive legal action would be necessary before the agreement forms part of the law. This leaves open the possibility of divergent approaches to implementation on the part of the Union and its Member States.

Mixed agreements are concluded for a wide range of reasons, legal and political. The division of competence between the Union and Member States is often not addressed at the time of the conclusion of the agreement[242] and, even where it is, it may provide little concrete assistance.[243] As a result, it is often not clear whether Union or Member States are responsible for the implementation of a mixed agreement or certain of its parts, as a matter of international law and as a matter of EU law.[244] This creates a further challenge for the Court of Justice when it is called upon to adjudicate upon mixed agreements, which has frequently been the case.

While the wide jurisdiction exercised by the Court in the context of pure Community agreements (as articulated in *Kupferberg*) is understandable, its extension to mixed agreements is more problematic. In *Demirel*,[245] a German court referred a number of questions to the Court of Justice relating to the interpretation of provisions on the free movement of workers under the Association Agreement concluded by the then Community and its Member States with Turkey. The German and United Kingdom Governments challenged the Court's jurisdiction to interpret the relevant provisions of the Agreement on the basis that it did not extend to provisions whereby Member States had entered into commitments in the exercise of their own powers. The Court rejected this argument, observing that the Agreement required Turkey to take part to some extent within the Community system and thus necessarily empowered the Community to guarantee commitments to it in fields covered by the Treaty, such as the free movement of workers.[246] Moreover, the fact

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[242] On this issue, see Cremona, note 212, at Chapter 2(2).

[243] See e.g. Koutrakos, "Interpretation of Mixed Agreements", at 128-129 (in Hillion and Koutrakos eds, note 263): "Whilst their objective is to enable the Union's partners to clarify issues of delineation of competence between the Union and the Member States, and consequently issues of responsibility, declarations of competence may be quite unhelpful .... In fact, declarations of competence may prove to be a distinctly unreliable yardstick, not only for third parties but also for Member States seeking guidance as to how to exercise their international law rights and comply with their relevant duties in accordance with their Union law obligations". See also Olson, "Mixity from the Outside" in Hillion and Koutrakos eds, note 242, at 335-337.

[244] For a recent analysis, see Kuijper, "International Responsibility for EU Mixed Agreements" in Hillion and Koutrakos eds, note 242, at 208.

[245] Case 12/86 *Demirel* [1987] ECR 3719.

[246] *Ibid.*, at para.9.

that it was for Member States to lay down the rules necessary to give effect to the relevant provisions, as Community law then stood, did not call the Court's jurisdiction into question.[247] The Court then repeated its statement in *Kupferberg* to the effect that "in ensuring respect for commitments arising from an agreement concluded by the Community institutions, the Member States fulfil, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement".[248] In so doing, the Court assimilated mixed agreements with pure Community agreements.[249] On this basis, it concluded that it had jurisdiction to interpret the relevant provisions of the Association Agreement, a jurisdiction which it has had frequently occasion to exercise, as will be considered in the next section.[250]

More recently, the Court of Justice has been faced with this issue in the context of preliminary references from national courts in relation to the interpretation of the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), one of the WTO Agreements to which both the Union and Member States are parties. While the "commercial aspects of intellectual property" now fall within the exclusive competence of the EU since the coming into force of the Treaty of Lisbon,[251] the basic principles established in this jurisprudence relating to the interpretation and application of mixed agreements in areas of shared competence remain valid. In *Hermès*,[252] a number of Member States intervened to challenge the Court of Justice's jurisdiction to interpret Article 50(6) TRIPS, which concerned the enforcement of trade marks by way of provisional measures, on the basis that no common rules on the protection of intellectual property rights had been adopted by the Community. The issue in *Hermès* arose in the context of a national, rather than a Community, trademark, which had been the subject of secondary legislation prior to the conclusion of TRIPS.[253] Because the Community was a party to TRIPS and Article 50 could apply to Community trademarks, the Court held that it had jurisdiction to interpret that provision.[254] Moreover, where the provision, which was procedural in nature, could apply to both national and Community trademarks, it was "clearly in

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[247] *Ibid.*, at para.10.
[248] *Ibid.*, at para. 11.
[249] See e.g. Kaddous, note 212, at 294-6: "In principle mixed agreements have the same status in the Community legal order as Community agreements especially as concerns provisions falling under Community competence".
[250] Case 12/86 *Demirel* [1987] ECR 3719, at para. 12.
[251] Article 3(1)(e) TFEU and Article 207 TFEU.
[252] Case C-53/96 *Hermès International* [1998] ECR I-3603.
[253] *Ibid.*, para. 28.
[254] *Ibid.*, para. 29.

the Community interest that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply".[255] Notwithstanding the fact that the case appeared on its face to involve the application of Article 50 TEU to a trademark falling outside the scope of EU law, the Court thus justified its jurisdiction to interpret the provision – and thereby to determine its effect within national legal orders for all purposes, whether or not they came within the scope of EU law – on the basis of the need for uniformity.

In *Parfums Christian Dior*,[256] the Court had to rule on its jurisdiction to interpret Article 50 TRIPS in its application not only to trademarks but also to industrial designs, in respect of which there was no Community legislation in being. First, having established that TRIPS was concluded under the joint competence of the Community and Member States, the Court stated that it had "jurisdiction to define the obligations which the Community has thereby assumed and, for that purpose, to interpret TRIPS".[257] Having emphasised the particular importance of this jurisdiction in cases where provisional measures were sought from national courts for the protection of rights under Community legislation falling within the scope of TRIPS, the Court again emphasised the procedural nature of Article 50 "which should be applied the same way in every situation falling with in its scope" and which therefore required "the judicial bodies of the Member States and the Community, for practical and legal reasons, to give it a uniform interpretation", something which could only be ensured by the Court of Justice.[258] As a result, the Court's jurisdiction was not confined to situations covered by trade-mark law.[259] However, the Court also placed an important qualification on its jurisdiction. It recognised that "in a field in respect of which the Community has not yet legislated and which consequently falls within the competence of the Member States", the protection of intellectual property rights, and measures adopted for that purpose, did "not fall within the scope of Community law". In those circumstances, it would be for the legal order of each Member State to determine the internal effects of an agreement, such as TRIPS. However, in the instant case, the qualification was more apparent than real: the need for uniformity in the interpretation of Article 50 TRIPS

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[255] *Ibid.*, para. 32.
[256] Joined Cases C-300/98 and 392/98 *Parfums Christian Dior* [2000] ECR I-11307.
[257] *Ibid.*, at para.33.
[258] *Ibid.*, at paras. 37-38.
[259] *Ibid.*, at para.39

"in every situation falling within its scope" justified the Court's assertion of jurisdiction, even though industrial designs did not fall within the scope of EU law.

Most recently, in *Merck Genéricos*,[260] the Portuguese Supreme Court referred a question to the Court of Justice as to the interpretation of Article 33 TRIPS, which provided for a 20-year minimum protection period for patents. Portuguese law, which had provided for a 15-year period of protection, was amended in June 1995 to provide for a 20-year period of protection but this did not apply to pre-existing patents. In the main proceedings, the owner of a pharmaceutical product patented prior to 1995 sought to rely on Article 33 TRIPS to support its claim for a 20-year protection period in circumstances where Merck had placed a generic drug based on the patented product on the market following the expiry of the 15-year protection period. After summarising its case-law, the Court reaffirmed its jurisdiction to define the obligations which the Community had assumed under a mixed agreement and, for that purpose, to interpret the provisions of the agreement.[261] The Court then reiterated its qualification from the *Dior* case to the effect that the Court had no jurisdiction to determine the internal effect of a mixed agreement in a field in which Community had not legislated. In the instant case, the Court found that there was no Community legislation in the area of patents so as to bring that field within the scope of Community law.[262] Accordingly, it was for the national court to determine whether or not Article 33 TRIPS had direct effect within the Portuguese legal order.[263] In *Merck*, therefore, the Court took a more cautious approach to the assertion of its jurisdiction that had been hitherto the case. Although the cases may be distinguished on the basis that Article 33 TRIPS is of a substantive character while Article 50 TRIPS is of a procedural character, thus requiring its uniform application whether or not the intellectual property right comes within EU law,[264] what they really highlight is the uncertainty of the jurisdictional boundaries between the Court of Justice and the courts of Member States in the context of mixed agreements.

Although considerable uncertainty pervades the Court's preliminary rulings jurisdiction in the context of mixed agreements, there are certain elements which are abundantly clear. First, it is for the Court of Justice to draw the jurisdictional

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[260] Case C-431/05 *Merck Genéricos – Produtos Farmacêuticos* [2006] ECR I-7001.
[261] *Ibid.*, at para. 33.
[262] *Ibid.*, at paras. 40 and 46.
[263] *Ibid.*, at para. 48.
[264] See Koutrakos, note 242, in Hillion and Koutrakos eds, *Mixed Agreements Revisited: the EU and its Member States in the World* (Hart Publishing, 2010), at 136.

boundaries, "to define the obligations which the Community has thereby assumed" and, by implication, the obligations which the Member States have assumed; in other words, the *Kompetenz-Kompetenz*. Secondly, the scope of the Community law or, now, EU law is a malleable concept and, if *Merck* is to provide any guidance, it is only in the clearest cases that the Court will be prepared to cede jurisdiction entirely. Thus, from the perspective of Member States such as Ireland, even where provisions of a mixed agreement remain within its competence and are accordingly subject to Article 29.6, it is ultimately for the Court of Justice to delineate exactly the extent of that competence.

This malleable scope of the field of EU law is also evident in the Court's approach to mixed agreements in the context of a number of enforcement actions taken by the Commission, two of which were against Ireland. These cases shed further light on the issue and illustrate that the division of competence between the EU and Member States is not merely an academic question but a practical issue of some importance. In *Commission v. Ireland (Berne Convention)*,[265] the Commission alleged that Ireland had failed to fulfil its obligations under Protocol 28 of the European Economic Area (EEA) Agreement by not ratifying the Berne Convention for the Protection of Literary and Artistic Work. Ireland acknowledged its failure to ratify the Convention in time and sought further time to enable it to finalise the process of updating its copyright legislation. The United Kingdom intervened in the proceedings, challenging the Court's jurisdiction to rule on matters within the EEA Agreement other than those which had been the subject of harmonisation measures at Community level, which was not the case with regard to intellectual property. While rejecting the admissibility of the UK's intervention, the Court's decision nonetheless addressed the issues which it had raised. First, the Court emphasised that the action for failure to fulfil obligations could "have as its subject only the failure to comply with obligations under Community law".[266] The Court then reaffirmed its *Demirel* jurisprudence to the effect that mixed agreements had the same status within the Community legal order as Community agreements and that, in ensuring respect for commitments under such agreements, Member States were fulfilling an obligation to the Community within the Community system.[267] It then addressed the substance of the case, finding that there could be "no doubt that the provisions of the Berne Convention cover an area which comes in large measure within the scope of

[265] Case C-13/00 *Commission v. Ireland* [2002] ECR I-2943.
[266] *Ibid.*, at para.13.
[267] *Ibid.*, at paras. 14-15.

Community competence":[268] the subject-matter of the Convention was "to a very great extent governed by Community legislation";[269] copyright and related rights fell "within the scope of application of the Treaty";[270] and thus, the Convention "creates rights and obligations in areas covered by Community law" so that there was a "Community interest in ensuring that all Contracting Parties to the EEA Agreement adhere to that Convention".[271] Having thus asserted its jurisdiction to assess compliance with the relevant provision, the Court found that Ireland had failed to fulfil its obligations under the Treaty.[272]

More recently, in *Commission v. Ireland (MOX Plant)*,[273] the Commission contended that the initiation of proceedings by Ireland against the United Kingdom under the aegis of the United Nations Convention on the Law of the Sea (UNCLOS), to which both the Community and Member States were parties, violated the duty of cooperation under the Treaty (then Article 10 EC) and the exclusive jurisdiction of the Court of Justice. Arising out of Ireland's objection to the construction of the MOX Plant facility for the recycling of plutonium from spent nuclear fuel, the provisions of UNCLOS invoked by Ireland in its proceedings against the United Kingdom related to the protection and preservation of the marine environment as well as certain authorisation and notification procedures. Before the Court of Justice, Ireland argued that there was no Community legislation governing these areas of UNCLOS. The Court rejected this argument, noting that "the existence of the Community's external competence in regard to protection of the marine environment

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[268] *Ibid.*, at para. 16.
[269] *Ibid.*, at para. 17.
[270] *Ibid.*, at para. 18.
[271] *Ibid.*, at para. 19.
[272] *Ibid.*, at paras. 21-23. See also Case C-239/03 *Commission v. France* [2004] ECR I-9325 *(Etang de Berre)*. In that case, the Commission claimed that France had violated the Convention for the Protection of the Mediterranean Sea against Pollution by failing to adopt measures to "prevent, abate and combat heavy and prolonged pollution of the Étang de Berre", a large saltwater marsh close to the Mediterranean Sea. France challenged the Court's jurisdiction on the basis that there was no Community legislation regulating discharges of fresh water and alluvia into a saltwater marsh, so that the provisions of the Convention and the Protocol that cover such discharges "did not fall within Community competence" (at para.22). However, the Court considered that the provisions of the Convention and the Protocol "without doubt cover[ed] a field which falls in large measure within Community competence". It stated that "[e]nvironmental protection, which is the subject-matter of the Convention and the Protocol, [was] in very large measure regulated by Community legislation", identifying a number of measures in this area (at para.28). On this basis, there was "a Community interest in compliance by both the Community and its Member States with the commitments entered into under those instruments" (at para.29) and the fact that Community legislation did not currently deal with the specific issues relied upon by France did not affect this finding (at para.30). Having established its jurisdiction, the Court proceeded to consider the merits of the action, holding that France had failed to fulfil its obligations under the Convention and under the Treaty.
[273] Case C-459/03 *Commission v. Ireland* [2006] ECR I-4635 *(MOX Plant)*.

[was] not, in principle, contingent on the adoption of measures of secondary law".[274] After examining the Council Decision concluding UNCLOS on behalf of the Community and the Declaration of Competence submitted to UNCLOS in this context which was a "useful reference base", the Court concluded that "the matters covered by the provisions of the Convention relied on by Ireland before the Arbitral Tribunal [were] very largely regulated by Community measures".[275] Thus, in the context of enforcement actions, as in its definition of the "scope of Community law" in the context of preliminary rulings, the Court takes a broad but variable approach to the concept of the "the Community interest" and the degree of regulation by Community measures.

After analysing the case-law to date, Koutrakos concludes that that "there is a thread which brings together the judgments …namely, the acknowledgment of the broad jurisdiction of the Court of Justice".[276] He describes this jurisdiction as being "of a curious shape and uncertain foundation".[277] Even though the Court has arguably shown a more cautious approach to its assertion of jurisdiction in the *Merck* case, that jurisdiction remains of great scope and breadth.

In those areas falling within the scope of EU law, there can be no denial of the importance of uniform interpretation of mixed agreements or of an effective duty of cooperation between the EU and its Member States. In such areas, the conferral of direct effect and supremacy on provisions of international agreements simply reflects the nature of EU law generally. However, in respect of those areas which do not or do not yet fall within the scope of EU law, the fact that the EU and its Member States have concluded a mixed agreement should not of itself bring those areas effectively within the scope of EU law and within the purview of the Court of Justice. If a field covered by provisions of a mixed agreement does not fall within the scope of EU law or affect a "Union interest", it is for each Member State, in accordance with its constitutional structures, to determine how those provisions take effect within its legal system. In a Member State such as Ireland, the implementation of such provisions within the Irish legal system would, in accordance with Article 29.6, require legislative action. The assertion of a broader jurisdiction would fail to respect not only the principle of conferral now expressly recognised in the Treaties but also the constitutional integrity of Member States. At the same time, it is important to

[274] *Ibid.*, at para. 94.
[275] *Ibid.*, at para. 110.
[276] *Ibid.*, at para. 135.
[277] *Ibid.*, at para. 136.

recognise that mixed agreements inevitably involve the collaboration and coordination of the EU and its Member States and the effectiveness of this coordination cannot be reduced to the question of competence alone but must be understood in the context of the broader interaction and dialogue between the EU, Member States and indeed the other parties to mixed agreements.

Nevertheless, the Court has made it clear that it is ultimately for it to define where the obligations lie in the context of mixed agreements. This inevitably gives its jurisprudence an important, often decisive influence on the status of such agreements within the legal systems of Member States, an influence which is especially pronounced in Member States such as Ireland with a dualist approach to the implementation of international agreements. As Lavranos notes, except for matters that fall within the exclusive competence of Member States, "the constitutional provisions of the EU Member States regarding the legal status and effect of international treaties in their domestic legal order are – by virtue of the influence of EC law – superimposed by Community law rules and the case-law of the ECJ".[278] In light of this substantial qualification on Member States' constitutional frameworks for the implementation of international agreements, the approach of the EU, and the ECJ, has become of central importance.

C. The Effect of International Agreements within the European Union Legal System

i. Introduction

One of the hallmarks of the legal system of the European Union has been its approach to the effect of its founding Treaties within its legal system and the legal systems of Member States.[279] As developed by the Court of Justice in its jurisprudence from *Van Gend en Loos* onwards,[280] the doctrine of direct effect has formed a central element of the legal order which was created by the Treaties and which has defined itself in opposition to traditional international law.[281] Allied with the system of judicial enforcement established under the Treaties and the principle of supremacy of European Union law, this marked a radical shift in the approach to the

[278] Lavranos, note 212, at 45.
[279] Eeckhout, note 212, at 274-275.
[280] Case 26/62 *Van Gend en Loos* [1963] ECR 1.
[281] See generally Craig and de Búrca, note 228, Chapter 8, who discuss the different understandings of the doctrine, whether understood in narrow terms as the capacity of a measure to confer rights on individuals or in broader terms as the capacity of a measure to be relied on by individuals before national courts where the measure is sufficiently clear, precise and unconditional.

implementation of European Union law from that traditionally adopted in respect of international law, particularly for those Member States with a dualist tradition such as Ireland. As it developed, the doctrine was applied not only to the Treaties themselves but also to secondary legislation adopted and to international agreements concluded under the Treaties. The focus of this section is on its extension to the international agreements to which the European Union, independently and with and its Member States, is a party.

As in the case of the international agreements to which Ireland is a party in its own right, the agreements to which the Union is a party, whether independently or alongside Member States, deal with a broad range of subject-matter and contain varied provisions which may or may not be required to take effect within the parties' internal legal systems. All too often, in the rush to compartmentalise or universalise the approach of the Court of Justice to international agreements, this basic reality has been neglected.

In *Kupferberg*, the Court acknowledged that the question of the effect of an international agreement within the European Union "may not be determined without taking account of the international origin of the provisions in question" and that, "in conformity with the principles of public international law", "Community institutions which have the power to negotiate and conclude an agreement with a non-member country are free to agree with that country what effect the provisions of the agreement are to have in the internal legal order of the contracting parties".[282] It was "only if that question has not been settled by the agreement" that it fell to be decided by the "courts having jurisdiction in the matter" and "in particular by the Court of Justice within the framework of its jurisdiction under the Treaty, in the same manner as any question of interpretation relating to the application of the agreement in the Community".[283] Having referred to the requirement under international law that there be *bona fide* performance of every agreement, the Court continued:

> Although each contracting party is responsible for executing fully the commitments which it has undertaken it is nevertheless free to determine the

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[282] Case 104/81 *Kupferberg* [1982] ECR 3641, at para.17. See also Case C-149/96 *Portugal v. Council* [1999] ECR I-8395, at para. 34. A rare example of an international agreement specifying its effect within internal legal orders is the 1988 Recommendation concerning Cattle adopted by the Standing Committee established under the European Convention on the Protection of Animals kept for Farming Purposes, Article 20 of which provided that it "shall have no direct application within Parties and shall be implemented according to the method that each Party considers adequate, that is through legislation or through administrative practice": see Case C-1/96 *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming* [1998] ECR I-1251, at para. 10.

[283] Case 104/81 *Kupferberg* [1982] ECR 3641, at para.17.

> legal means appropriate for attaining that end in its legal system, unless the agreement, interpreted in the light of its subject-matter and purpose, itself specifies those means.[284]

However, in most international agreements, the question of their implementation within the parties' internal legal systems is not expressly addressed. The examination of the process of implementation in the Irish legal system illustrates how that question raises difficult issues of a political as well as of a purely legal character. Thus, while the Court's statement of principle in *Kupferberg* might envisage a secondary role for the Court in determining the internal effect of the EU's international agreements – in that it is primarily for the parties themselves, and in particular their political organs charged with the negotiation and conclusion of such agreements, to determine this question – in practice the Court is the decision-maker.

In coming to its decisions on the direct effect of international agreements, the Court has taken a relatively consistent approach to the criteria to be adopted albeit with varying terminology and sequencing issues[285]: it looks broadly at the spirit, general scheme and purpose or the nature and purpose of the agreement to determine whether it is capable of taking direct effect within the internal legal system; it also looks at the specific provision of the agreement being invoked to determine whether it is sufficiently clear, precise and unconditional to be given direct effect. However, it is the application of these criteria to different international agreements which has given rise to considerable complexity in the jurisprudence of the Court.

First, in respect of a wide range of the EU's agreements with different countries or groups of countries, whether they take the form of free trade, association, partnership or cooperation agreements, the Court has generally recognised the direct effect of those agreements' provisions within the EU legal system. Secondly, in relation to the multilateral trade agreements concluded under the aegis of the World Trade Organisation, the Court has consistently denied direct effect to the provisions of such agreements within the EU legal system. While much of the Court's case law in this field falls within these two categories, it is important to underline that recent case-law confirms that it is an oversimplification to understand the position solely by reference to this dichotomy. Moreover, in practice, that dichotomy is less stark than it may first appear: even those agreements which are

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[284] *Ibid.*, at para.18.

[285] See the critique of the Court's reversal of sequencing in some cases (looking at the particular provision before the purpose and nature of the agreement): see Kaddous, note 212, at 304 and Jacobs, note 212, at 31-32.

recognised as having direct effect may require implementing measures in order to be fully effective and even those which are not directly effective may nonetheless have important indirect effects within the EU legal system. The purpose of this section is not to set out *in extenso* the jurisprudence of the Court or rehash the considerable volume of academic commentary which it has inspired. Instead, it is to set out the broad lines of the jurisprudence with a view to understanding more fully the approach of the EU legal system to the implementation of international agreements.

ii. International Agreements Having Direct Effect within the European Union Legal System

After showing some initial caution, the Court of Justice has extended direct effect to a wide range of its international agreements. In particular, direct effect has been recognised in the context of bilateral agreements between the EU and its Member States, on the one hand, and third countries, on the other hand, whether as a prelude to ultimate accession to the EU, as in the case of Free Trade, Association and Europe Agreements, or simply as part of the strengthening of special trading and political relations, such as in the case of the ACP and Partnership and Coperation Agreements. In this section, the range of international agreements to which the Court has accorded direct effect is briefly examined.

a. Agreements with the African, Caribbean and Pacific (ACP) States

Since its foundation, the Union has developed special relationships with a group of African, Caribbean and Pacific States – now comprised of 79 members, many of which are former colonies of Member States – through a series of agreements, beginning with the Yaoundé Conventions, followed by the Lomé Conventions, and now embodied in the Cotonou Agreement.[286] In the early case of *Bresciani*,[287] by way of preliminary reference from the Tribunale of Genoa, the Court of Justice was asked whether Article 2.1 of Yaoundé Convention – which provided that goods from ACP States should benefit from the progressive abolition of custom duties and charges having an equivalent effect between Member States of the then EEC – had immediate effect so as to confer on individuals a right to rely on it to set aside an

[286] Originally focused on cooperation in trade and development, and creating an institutional framework to this end, the nature of the agreements has changed significantly over time, with an increased emphasis on political dialogue between the parties.
[287] Case 87/75 *Bresciani* [1976] ECR 129.

inconsistent provision of Italian law. In order to do so, in its decision, the Court said that "regard must be simultaneously paid to the spirit, the general scheme and the wording of the Convention and of the provision concerned".[288] To this end, the Court recalled the origins and purpose of the Convention, which was to promote the development of the ACP States and not to ensure equality of obligations between those States and the EEC and its Member States. The fact that its provisions did not fall to be applied on a reciprocal basis did not prevent recognition of their direct effect. Having regard to the fact that the EEC undertook precisely the same obligation to abolish charges having an equivalent effect to custom duties towards ACP States, as its Member States had undertaken *inter se*, the Court concluded that the obligation, which was "specific and not subject to any implied or express reservation on the part of the Community", was "capable of conferring on those subject to Community law the right to rely on it before the Courts".[289] In *Chiquita Italia*,[290] the Court recognised that certain provisions of the Fourth ACP-EEC Lomé Convention "may contain provisions of such a nature as to confer rights on individuals which they may invoke before the national courts"[291] and held that Article 1 of Protocol No. 5 to the Convention on bananas could be relied upon to challenge contravening national measures.[292] However, it is not clear to what extent similar effect will be afforded to the provisions of the Cotonou Agreement, the successor to the Yaoundé and Lomé Conventions.[293]

b. Free Trade Agreements

At an early stage, the Court also recognised the direct effect of certain provisions in Free Trade Agreements concluded by the then EEC with third countries such as Portugal, Austria and Sweden which are now among the Member States of the EU.[294]

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[288] *Ibid.*, at para. 16.
[289] *Ibid.*, at para. 25.
[290] Case C-469/93 *Chiquita Italia* [1995] ECR I-4533. The judge rapporteur in that case was the Irish member of the Court, Judge Murray, now Chief Justice Murray.
[291] *Ibid.*, at para.35.
[292] *Ibid.*, at para. 63. See also Case C-102/09 *Camar* (not yet reported) where the Court considered it unnecessary to consider the issue of direct effect under the Fourth ACP-EEC Lomé Convention.
[293] There has been very little judicial consideration of the Cotonou Agreement. See T-128/05 *SPM v. Council and Commission* (Judgment of 13th November 2008) where the Court of Final Instance, while recognising the authority of *Chiquita Italia*, held that only certain provisions of Article 168 of the Fourth ACP-EEC Lomé Convention had direct effect (para. 101) and held that Article 1 of Protocol No. 5 to the Cotonou Agreement could not have direct effect (para.119).
[294] Portugal became a member of the EEC in 1986, Austria and Sweden in 1995. In the case of *Polydor*, the Court emphasised that the fact that the EEC-Portugal Free Trade Agreement contained provisions analogous to those of the EEC Treaty did not necessarily mean that those provisions must be interpreted in an identical manner on account of those treaties' different purposes. However, the

In *Kupferberg*,[295] the Court was asked to address whether Article 21 of the Free Trade Agreement with Portugal, which imposed a prohibition on discrimination in matters of taxation, had direct effect and could be relied upon by an individual to challenge discriminatory tax measures. While acknowledging that analogous provisions of the FTA and the EEC Treaty must be interpreted in their own context, the Court found that the nature and structure of the agreement – notwithstanding features such as lack of reciprocity in the internal treatment of the Agreement, the existence of a special institutional framework, or the safeguard clauses which were applicable in limited circumstances – did not prevent a trader from relying on the Agreement's provisions before national courts.[296] Furthermore, Article 21, which must be considered in its context and having regard to the purpose of the Agreement, was unconditional and sufficiently precise for direct effect.[297] On the facts of the case, however, the Court concluded that there was no discrimination in the tax treatment of the imported product. In later cases, the Court reaffirmed the direct effect of provisions of other free trade agreements.[298]

c. Association Agreements

In *Demirel*, [299] the applicant was a Turkish national who had joined her husband in Germany and who claimed a right to remain in that country on the basis of the provisions of the Association Agreement concerning the free movement of workers. In its judgment which laid down a number of important points of principle in respect of mixed agreements,[300] the Court analysed the objectives and the provisions of the Agreement, noting that Article 12 envisaged the Association Council formulating rules to provide guidance on the provisions relating to free movement of workers which was to be secured by progressive stages. At that point in time, the decisions of the Council had not yet dealt with the issue of family reunification which would have been relevant to the applicant's situation. On this basis, the Court held that the relevant provisions of the Agreement were not sufficiently precise and unconditional to be relied upon by the applicant before the courts. However, in its subsequent

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Court did not directly address the question of the direct effect of those provisions. See Case 270/80 *Polydor* [1982] ECR 329.

[295] Case 104/81 *Kupferberg* [1982] ECR 3641.

[296] *Ibid.*, at paras. 19-22.

[297] *Ibid.*, at paras. 26-27.

[298] Case C-163/90 *Legros* [1992] ECR I-4625; Case C-207/91 *Eurim-Pharm* [1993] ECR I-3723; Joined Cases C-114-115/95 *Texaco* [1997] ECR I-4263.

[299] Case 12/86 *Demirel* [1987] ECR 3719.

[300] See above the discussion at 145.

jurisprudence, the Court adopted a more open approach to the direct effect of association agreements. In *Pabst and Richarz*,[301] the Court, when asked whether a German importer of spirits could rely on the prohibition on tax discrimination contained in Article 53 of the Association Agreement with Greece,[302] held that Article 53 constituted a "clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure".[303] As Eeckhout has observed, "the swiftness with which the Court concluded that there was direct effect appeared to indicate that association agreements are in principle capable of producing direct effect".[304]

In *Sevince*,[305] a Turkish national who had been employed in the Netherlands for a number of years applied for a residence permit, relying on a number of decisions taken by the Association Council established under the Association Agreement. The effect of these decisions was that, after a specified number of years of paid employment, a Turkish national was entitled to free access to paid employment of his or her choice within the Member State. In 1980, the Dutch authorities refused to grant the applicant an extension of his residence permit but, during the period when this decision under appeal (up to 1986), the applicant was granted a work permit. While the Court ultimately rejected the applicant's contention that the concept of legal employment in the decisions covered circumstances in which a work permit was granted pending the outcome of an appeal of the authorities' decision,[306] it found that the decisions of the Association Council could enjoy direct effect under the same conditions as the provisions of the Agreement itself. The relevant provisions of the decisions, being "in clear, precise and unconditional terms",[307] were capable of direct application and this was confirmed by the "purpose and nature" of the decisions and of the Agreement under which they were made.[308] Moreover, the fact that the provisions envisaged that the relevant procedures were to be established by national rules did not affect their direct effect, as this merely clarified the obligation of Member States to take the necessary administrative measures without empowering them to restrict, or impose any

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[301] Case 17/81 *Pabst & Richarz* [1982] ECR 1331.
[302] Greece became a member of the European Economic Community in 1981.
[303] Case 17/81 *Pabst & Richarz* [1982] ECR 1331, at para. 27.
[304] Eeckhout, note 212, at 284.
[305] Case C-192/89 *Sevince* [1990] ECR I-03461.
[306] *Ibid.*, at para. 33.
[307] *Ibid.*, at para. 17.
[308] *Ibid.*, at para. 19.

conditions upon, the precise and unconditional right granted by the decisions.[309] In light of the difficulties in delineating the proper bounds of the EU and Member States in mixed agreements, the Court's willingness to read down the Agreement's express provisions on national rules is striking. The important role of the Association Council decisions in the implementation of the Association Agreements became clear in a number of later cases.[310]

In *Savas*,[311] the Court was asked to give direct effect to Article 13 of the Association Agreement, which provided that the analogous provisions of the European Treaties would provide guidance in the abolition of restrictions on freedom of establishment, and Article 41(1) of its Additional Protocol, which prohibited the parties from introducing new restrictions on freedom of establishment from the date of its entry into force. While the Court refused to give direct effect to Article 13 of the Agreement because it merely set out a programme, did not lay down precise rules, and no implementing measures had been adopted thereunder, it held that Article 41(1) of the Additional Protocol laid down "clearly, precisely and unconditionally, an unequivocal 'standstill' clause"[312] and must be regarded as directly applicable, a conclusion which was not invalidated by an examination of its purpose and subject-matter.[313]

Most recently, in *Soysal*,[314] again concerning Article 41(1) of the Additional Protocol of the Association Agreement with Turkey, prohibiting the introduction of

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[309] *Ibid.*, at para. 22.

[310] In *Taflan-Met*, the Court was asked to give direct effect to the provisions of Decision 3/80 relating to the coordination of Member States' social security schemes and their application to Turkish workers and their families, specifically in the context of invalidity or survivors' pensions under Title III of the Decision. However, the Court held that this decision was, by its nature, intended to be supplemented and implemented by a subsequent act of the Council, which had not yet been adopted. Although some of the provisions of the decision were clear and precise, the provisions of the decision invoked by the applicants could not be given direct effect as long as the supplementary measures remained outstanding. See Case C-277/94 *Taflan-Met* [1996] ECR I-4085, at paras. 32-38. In *Sürül*, the Court was once again faced with the question of the direct effect of certain provisions of Decision 3/80, in this case Article 3(1) dealing with the non-discrimination on the grounds of nationality. Noting that the proposals for supplementary measures to the Decision did not concern Article 3(1), the Court distinguished the reasoning in *Taflan-Met* which, it said, could not be "transposed to the principle of equal treatment in the field of social security, embodied in Article 3(1) of that decision". Applying the established criteria, the Court proceeded to find that Article 3(1) was capable of having direct effect. See Case C-262/96 *Sürül* [1999] ECR I-02685, at paras. 57, 61-74. See especially para. 63: "As the Commission rightly pointed out, that rule of equal treatment lays down a precise obligation of result and, by its nature, can be relied on by an individual before a national court as a basis for requesting it to disapply the discriminatory provisions of the legislation of a Member State under which the grant of a right is subject to a condition not imposed on nationals. No further implementing measures are required ...".

[311] Case C-37/98 *The Queen v. Secretary of State for the Home Department, ex parte Abdulnasir Savas* [2000] ECR I-2927.

[312] *Ibid.*, at para. 46.

[313] *Ibid.*

[314] Case C-228/06 *Soysal and Savatli* [2009] ECR I-1031.

new restrictions on free movement, the Court of Justice was asked whether this provision was contravened by the introduction of a visa requirement for Turkish nationals who were resident in Turkey and worked as drivers for a Turkish company, involved in the international transport of goods to Germany using lorries registered to a German company. Although such a visa requirement had not existed prior to the entry into force of the Additional Protocol, it was subsequently imposed, initially by German authorities in 1980 and then in a German law implementing Regulation (EC) No. 539/2001 listing the third countries whose nationals had to be in possession of visas when crossing the external borders of the Member States. Following its case-law, the Court first found that Article 41(1) had direct effect[315] and that the measure in question constituted a new restriction of the type prohibited by that provision.[316] Significantly, the Court held that this conclusion "could not be called into question by the fact that the legislation currently in force in Germany merely implements a provision of secondary Community legislation", recalling that:

> ... the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements.[317]

Thus, the Court was prepared to recognise the direct effect of the agreement at the expense of secondary EU legislation.[318]

To conclude, while the Court's approach has been nuanced, taking into account the nature of the particular provision and the framework within which it is to be implemented, it has generally recognised that the provisions of association agreements (and decisions made thereunder) may take direct effect with the EU legal system.[319]

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[315] *Ibid.*, at para. 46.
[316] *Ibid.*, at para..57.
[317] *Ibid.*, at para. 59.
[318] See de Witte, "Direct Effect, Primacy and the Nature of the Legal Order" in Craig and de Burca eds, *The Evolution of EU Law* (2nd ed., Oxford University Press, 2011), at 337, noting that "there also continues to be rather spectacular examples of the more generous approach as for instance in *Soysal* where the Court, by recognizing the direct effect of an obscure standstill provision in a Protocol to the 1963 Association Agreement with Turkey, precludes the application of the 'Schengen' visa requirement to Turkish service providers entering Germany, thereby disrupting a major piece of the Union's harmonized immigration control regime".
[319] This jurisprudence has been reaffirmed in later cases: Case C-237/91 *Kus* [1992] ECR I-6781; Case C-432/92 *Anastasiou* [1994] ECR I-03087; Case C-355/93 *Eroglu* [1994] ECR I-5113; Case C-434/93 *Bozkurt* [1995] ECR I-1475; Case C-171/95 *Tetik* [1997] ECR I-329; Case C-386/95 *Eker* [1997] ECR I-2697; Case C-285/95 Kol [1997] ECR I-3069; Case C-36/96 *Gunaydin* [1997] ECR I-5143; Case C-98/96 *Ertanir* [1997] ECR I-5179; Case C-162/96 *Racke* [1998] ECR I-3655; Case C-1/97 *Birden* [1998] ECR I-7747; Case C-340/97 *Nazli* [2000] ECR I-957; Joined Cases C-102 and 211/98 *Kocak* [2000] ECR I-1287. See most recently Case C-14/09 *Genc* (Judgment of 2nd April

d. Europe Agreements

In line with this jurisprudence, the Court recognised the direct effect of provisions of the Europe Agreements which were concluded between the EU and countries in Central and Eastern Europe prior to their accession to the EU. In its judgments in *Kondova*,[320] *Barkoci and Malik*,[321] and *Gloszczuck*,[322] the Court was required to consider the right of establishment under the relevant Europe Agreements with Bulgaria, the Czech Republic and Poland respectively. Each of these agreements contained a proviso to the effect that nothing therein should prevent the parties from applying their laws and regulations regarding entry and stay, work, labour conditions and establishment of natural persons, and supply of services, provided that they did not do so in a manner as to nullify or impair the benefits arising under the terms of the agreements. The applicants – having been refused asylum in the UK (in the *Kondova* and *Barkoci and Malik* cases) or having entered on temporary tourist visas but having stayed on thereafter (as in *Gloszczuck*) – invoked the Agreements in an effort to remain in the United Kingdom. The Court concluded that the right of establishment under the Agreements had direct effect. However, after holding that the rights of entry and residence were corollaries to the right of establishment and were not absolute privileges, the Court adopted a proportionality test to determine whether the immigration rules of the Member State (the UK in these cases) struck "at the very substance of the rights" under the Agreements "by making exercise of those rights impossible or excessively difficult".[323] It held that systems of prior control, such as operated under the U.K. immigration rules, were not *per se* precluded by the Agreements[324] and that, in cases where a person's status in the host Member State was irregular, the requirement to submit a new application from the State of origin did not infringe the guarantee of equal treatment under the Agreements.[325] In these

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2010, not yet reported); Case C-462/08 *Bekleyen* (Judgment of 21st January 2010, not yet reported); Case C-242/06 *Sahin* (Judgment of 17th September 2009, not yet reported).

[320] Case C-235/99 *Kondova* [2001] ECR I-6427.

[321] Case C-257/99 *Barkoci and Malik* [2001] ECR I-6557.

[322] Case C-63/99 *Gloszczuck* [2001] ECR I-6369.

[323] Case C-235/99 *Kondova* [2001] ECR I-6427, at para.59; Case C-257/99 *Barkoci and Malik* [2001] ECR I-6557, at para.59; Case C-63/99 *Gloszczuck* [2001] ECR I-6369, at para. 56.

[324] Case C-235/99 *Kondova* [2001] ECR I-6427, at para.60-65; Case C-257/99 *Barkoci and Malik* [2001] ECR I-6557, at para.74; Case C-63/99 *Gloszczuck* [2001] ECR I-6369, at para. 58-62.

[325] Case C-235/99 *Kondova* [2001] ECR I-6427, at para.90; Case C-257/99 *Barkoci and Malik* [2001] ECR I-6557, at para.82; Case C-63/99 *Gloszczuck* [2001] ECR I-6369, at para. 85. For a useful commentary and critique of these decisions, see Nic Shuibhne, "The European Court of Justice and the Europe Agreements: Shaping a Legal Framework" (2001) 23 *DULJ* 203.

cases, the Court, while recognising the Agreement's direct effect, nonetheless afforded Member States a certain amount of leeway in the modalities of its implementation.

In *Pokrzeptowicz-Meyer*,[326] for example, the applicant was a Polish national who worked as a foreign language assistant in a German university under a fixed-term contract. She challenged the provisions of German law which allowed such positions to be filled by means of fixed-term contracts whereas, for other positions performing special duties, recourse to fixed-term contracts had to be individually justified on an objective basis on the basis that they violated Article 37(1) of the Europe Agreement concluded with Poland which prohibited discrimination in respect of conditions of employment on the ground of nationality. The Court held that Article 37(1) was capable of having direct effect, notwithstanding that it was expressed to be "[s]ubject to the conditions and modalities applicable in each Member State", which proviso could not be interpreted in such a way as to allow a Member State to subject the principle of non-discrimination to conditions or discretionary limitations, thereby rendering the provision meaningless and depriving it of any practical effect.[327] Here, as in *Sevince*, the Court, in granting direct effect to the Agreement's provision, clearly reads down the proviso which is for the benefit for Member States.

The Europe Agreements have also been considered in the Irish courts, clearly illustrating the effect of the EU approach to implementation of international agreements, and specifically mixed agreements, on the legal systems of Member States. In *G.A.G. v. Minister for Justice*,[328] the High Court certified three points of law of exceptional public importance to the Supreme Court in relation to the effect of the Europe Agreements on the status of nationals of the Czech Republic and Romania who had made unsuccessful applications for asylum and who, when deportation orders were being made, sought but were refused leave to remain in the State with a view to invoking the rights of establishment under those Agreements. Following the Court of Justice decisions in the *Gloszczuck*, *Barkoci and Malik*, and *Kondova* cases, the Supreme Court held that Member States, such as Ireland, were entitled to impose a system of prior control requiring applications for a right of establishment under the Agreements to be submitted from the applicant's home state and that this requirement did not nullify or impair the benefits accruing to the

[326] Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049.
[327] Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049, at para. 24.
[328] *G.A.G. v. Minister for Justice* [2003] 3 IR 442.

applciants under the Agreements. However, what is most interesting about the decision is the fact that at no stage is there any discussion of the basis on which the Agreement forms part of Irish law. The Court recognised that the Europe Agreements were entered into by the relevant states "with the European Communities and their member states".[329] It then set out the relevant provisions and referred briefly to the "administrative practices" of the Department of Justice which serve as "national measures for implementing the Europe Agreements".[330] Citing the *Gloszczuck*, *Barkoci and Malik*, and *Kondova* case at the outset of its decision, the Court noted that it was "common case that art. 45(3) of the Europe Agreements relied upon by the applicants has direct effect and may be relied upon by the applicants before the courts in this jurisdiction".[331] Thus, notwithstanding the fact that in the normal course such an international agreement concluded by the State would require positive legal action in order to take effect in the Irish legal system in accordance with Article 29.6 of the 1937 Constitution, the fact that the agreement is one which has also been concluded by the European Communities and which the Court of Justice has held to have direct effect is sufficient to circumvent the normal constitutional procedures without further comment or consideration. In this decision, therefore, the Supreme Court showed the same ready acceptance of the direct effect of the mixed agreements concluded by the EU as it has shown in respect of the primary and secondary law of the EU more generally.

e. Partnership and Cooperation Agreements

The EU has also concluded a range of other agreements providing for political dialogue and cooperation in trade and in other areas with third countries. The most important examples of such agreements are currently the Euro-Mediterranean Association Agreements[332] (which were generally proceeded by Cooperation Agreements) and the Partnership and Cooperation Agreements.[333] Eeckhout has

[329] [2003] 3 IR 442, at 454.
[330] [2003] 3 IR 442, at 456.
[331] [2003] 3 IR 442, at 458.
[332] The EU has concluded partnership and cooperation agreements with nine countries: Armenia; Republic of Azerbaijan; Georgia; Republic of Kazakhstan; Kyrgyz Republic; Republic of Moldova; Russian Federation; Ukraine; Republic of Uzbekistan.
[333] The relevant countries are: the Arab Republic of Egypt, the State of Israel, the Hashemite Kingdom of Jordan, the Republic of Lebanon, the Kingdom of Morocco, the Republic of Tunisia and the People's Democratic Republic of Algeria.

described these as the "weakest type of bilateral agreement" between the Union and third countries.[334]

In line with its jurisprudence on other forms of bilateral agreement, the Court has considered that provisions of such agreements can have direct effect.[335] In *Kziber*,[336] for example, the plaintiff sought to rely on Article 41(1) of the EEC-Morocco Cooperation Agreement which prohibited discrimination in the treatment of workers in the field of social security on the ground of nationality. The Court first examined the terms of Article 41(1) and then the purpose and nature of the Agreement, concluding that the provision in question was capable of having direct effect, notwithstanding that such cooperation agreements differed in their objectives from, for example, association agreements. Similarly, in *El-Yassini*,[337] the Court held that Article 40(1) of the Agreement, which laid down a principle of non-discrimination in the field of working conditions and remuneration on the ground of nationality, was directly effective. More recently, in the context of Article 64(1) of the Euro-Mediterranean Association Agreement with Tunisia, which was to similar effect prohibiting discrimination in the field of working conditions and remuneration on the ground of nationality, the Court has confirmed that this provision had direct effect.[338]

In the context of Partnership and Cooperation Agreements, the Court has confirmed the direct effect of similar provisions. An interesting example of this is the case of *Simutenkov*,[339] which raised the issue of the direct effect of Article 23(1) of the Partnership and Cooperation Agreement with Russia, which laid down a prohibition on discrimination, on the ground of nationality, against workers in respect of conditions of employment, remuneration and dismissal. The applicant was a Russian national, who was a professional footballer with Club Deportivo Tenerife at the time of the preliminary reference. On the basis of Article 23(1), he challenged the rule of the Spanish sports federation which limited the number of players from non-EEA countries who could be fielded in national competitions. The Court held that Article 23(1) was framed "in clear, precise and unconditional terms"[340] and that

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[334] Eeckhout, note 212, at 289.
[335] In addition to the cases discussed in this paragraph, see Case C-58/93 *Yousfi* [1994] ECR I-1353; Case C-103/94 *Krid* [1995] ECR I-719; Case C-113/97 *Babahenini* [1998] ECR I-183; Case C-179/98 *Mesbah* [1999] ECR I-7955.
[336] Case C-18/90 *Kziber* [1991] ECR I-199.
[337] Case C-416/96 *El-Yassini* [1999] ECR I-1209.
[338] Case C-97/05 *Gattoussi* [2006] ECR I-11917.
[339] Case C-265/03 *Simutenkov* [2005] ECR I-2579.
[340] *Ibid.*, at para. 22.

its direct effect was not gainsaid by the Agreement's "purpose and nature", which was "limited to establishing a partnership between the parties, without providing for an association or future accession".[341] In so holding, the Court again rejected arguments that the proviso to Article 23(1), which said that it was "[s]ubject to the laws, conditions and procedures applicable in each Member State", could be construed as allowing Member States to subject the non-discrimination principle to discretionary limitations[342] and also that Article 27, which provided that the principle was to be implemented on the basis of recommendations of the Cooperation Council, made its implementation or effects subject to the adoption of any subsequent measure.[343]

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Although it is not only in the case of agreements of the categories just outlined that the Court has been prepared to grant direct effect,[344] it is within the context of those categories of agreements that the Court has developed its approach to the granting of direct effect to international agreements. As the EU has expanded the scope of its special relationships with a wider array of countries, the Court has extended the logic of direct effect to the provisions of those agreements and even to the decisions of bodies established by the agreements. In doing so, it has sometimes read down and effectively ignored express provisions which afford Member States leeway in giving effect to the agreements. However, the Court's approach has been nuanced in other respects, paying close attention to the nature of the specific provision and the wider framework of implementation. While direct effect undoubtedly plays an important role in ensuring implementation, so too do the institutions established under the agreements, such as the Association Councils, and the decisions they take to define and give effect to specific provisions. While these categories of agreement vary in certain respects, common to them all are provisions which echo those of the European Treaties themselves. Having regard to this important feature, it is open to

[341] *Ibid.*, at paras. 26-28.
[342] *Ibid.*, at para. 24.
[343] *Ibid.*, at para. 25.
[344] For an example in a very different context, see Case C-213/03 *Pêcheurs de l'étang de Berre v EDF* [2004] ECR I-7357, where the Court held that Article 6(3) of the Convention for the Protection of the Mediterranean Sea against Pollution from Land-based Sources and Article 6(1) of the amended Protocol (respectively imposing an obligation for Member States to subject discharges of listed substances listed to the issue by the competent national authorities of an authorization and prohibiting, without such an authorisation, the discharge of substances which, although not toxic, have an adverse effect on the oxygen content of the marine environment) could have direct effect.

question to what extent this jurisprudence should be seen as forming the basis of a general rule of direct effect of international agreements.

iii. International Agreements Not Having Direct Effect within the European Union Legal System

a. GATT/WTO Agreements

Although the Court has been generous in its granting of direct effect to the categories of agreement discussed in the previous section, it has consistently refused to grant direct effect to one of the most important international agreements binding on the EU: the General Agreement on Tariffs and Trade (GATT) and, more recently, the World Trade Organisation (WTO) Agreement, of which the GATT now forms part.

In the seminal decision of *International Fruit Company*,[345] the applicant challenged the validity of an EEC Regulation restricting the import of apples through a system of import licences by reference to Article XI of the GATT, which prohibited quantative restrictions on imports and exports between contracting parties, such as quotas, licences, and similar measures. First, the Court confirmed that, notwithstanding that the EEC was not a party to the GATT, it was bound by the GATT because it had assumed the competence of Member States in this field. Then, the Court considered whether the provisions of the GATT, specifically Article XI, could confer rights on citizens which they could invoke before the courts i.e. whether it had direct effect. To this end, the Court examined the spirit, general scheme and terms of the GATT, setting out its key features:

> This Agreement which, according to its Preamble, is based on the principle of negotiations undertaken on the basis of "reciprocal and mutually advantageous arrangements" is characterized by the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties.[346]

After setting out the relevant provisions of the GATT, the Court concluded that these factors were sufficient to show that Article XI GATT thereof was "not capable of conferring on citizens of the Community rights which they can invoke before the

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[345] Joined Cases 21/72 to 24/72 *International Fruit Company* [1972] ECR 1219.
[346] *Ibid.*, at para. 21.

courts"[347] and, accordingly, that the validity of the contested Regulations could not be affected by Article XI GATT.[348] This position was confirmed in a series of further cases, including where the measures challenged were provisions of national law[349] and where it was a Member State, rather than a private individual, which sought to rely on the GATT as a condition of the legality of a measure adopted under the Treaties.[350]

However, the Court also recognised that it may consider the GATT in certain circumstances. First, in *Fediol*,[351] the Court was willing to interpret and apply the relevant provisions of the GATT in circumstances where the EC measure – in this case, Regulation 2641/84 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices – defined "illicit commercial practices" as "any international trade practices attributable to third countries which are incompatible with international law or with the generally accepted rules", which included the GATT. Thus, reference to the GATT within EC legislation could justify recourse to it in interpreting and applying that measure. Secondly, in *Nakajima*,[352] in a challenge to anti-dumping duties imposed upon certain Japanese printers, it was argued that the relevant EC measure (the basic regulation) was invalid because it violated the GATT Anti-Dumping Code. The Court referred to the recitals of the basic regulation's preamble which stated that it was "adopted in accordance with existing international obligations, in particular those arising from Article VI of the General Agreement and from the Anti-Dumping Code"[353] and thus "in order to comply with the international obligations of the Community".[354] In those circumstances, the Court could examine whether the regulation was adopted in breach of the relevant provisions of the Anti-Dumping Code. Thus, where EU legislation was adopted in order to implement particular obligations under the GATT, the Court could examine whether that legislation complied with those obligations. In both cases, it was the measures of EC law which brought the GATT into play in the Court's analysis of the legality of those measures. In both cases, too, the Court rejected the substantive arguments based on the

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[347] *Ibid.*, at para. 27.
[348] *Ibid.*, at at para. 28.
[349] Case 266/81 *SIOT* [1983] ECR 731; Case C-469/93 *Chiquita Italia* [1995] ECR I-4533.
[350] Case C-280/93 *Germany v. Council (Bananas)* [1994] ECR I-4973.
[351] Case 70/87 *Fediol* [1989] ECR 1781.
[352] Case C-69/89 *Nakajima* [1991] ECR I-2069. See more recently Case C-76/00P *Petrotub* [2003] ECR I-79 and T-45/06 *Reliance Industries* [2008] ECR II-2399.
[353] Case C-69/89 *Nakajima* [1991] ECR I-2069, at para.30.
[354] *Ibid.*, at para. 31.

GATT.[355] Finally, the Court has recognised that "where the wording of secondary Community legislation is open to more than one interpretation, preference should be given as far as possible to the interpretation which renders the provision consistent" not only with the European Treaties, or, in the case of an implementing regulation, with its basic regulation, but also with international agreements,[356] including the GATT and related agreements.

In 1995, the GATT 1947 was replaced by the WTO Agreement which encompassed not only the GATT but also a range of other agreements including General Agreement on Trade in Services (GATS) and agreements on matters such as Trade-Related Aspects of Intellectual Property (TRIPS), Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS). In the wake of the Court's Opinion 1/94,[357] both the European Community and Member States became parties to the WTO Agreements. The WTO system led to an overhaul of the international trading system in many respects, notably in the Dispute Settlement Understanding which transformed its dispute resolution processes. As a result, the attitude of the Court to the new regime was much anticipated.[358]

In the *Portuguese Textiles* case,[359] Portugal challenged the legality of a Council decision concluding certain agreements on trade in textiles with India and Pakistan on the basis *inter alia* that it constituted a breach of the Community's obligations under the WTO Agreements. While acknowledging that key features of the WTO Agreement – including its dispute settlement mechanism and provisions in relation to safeguard measures – were significantly different from those under GATT 1947, the Court emphasised that negotiations retained crucial importance in the resolution of disputes under the WTO Agreements and that the WTO was based on a system of reciprocal obligations between trading partners which could be compromised if there was a lack of reciprocity in their approach to the internal effects of the Agreements.[360] "To accept that the role of ensuring that Community law complies with those rules devolves directly on the Community judicature", the Court said, "would deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading

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[355] For a discussion of the "parsimonious application" of this case-law, see Arcuri and Poli, "What Price for the Community Enforcement of WTO Law?" *EUI Working Paper* (2010/01), at 8-9.
[356] Case C-61/94 *Commission v. Germany (International Dairy Arrangement)* [1996] ECR I-3989, at para.52. See Eeckhout, note 212, at 314-316.
[357] Opinion 1/94 [1994] ECR I-5267.
[358] See e.g. Eeckhout, note 212, at 294-296.
[359] Case C-149/96 *Portugal v. Council* [1999] ECR I-8395.
[360] Case C-149/96 *Portugal v. Council* [1999] ECR I-8395, at para. 45.

partners".[361] Thus, having regard to their nature and structure, the WTO Agreements were "not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions".[362] The Court noted that this interpretation corresponded with the final recital of the Decision 94/800 (by which the Community had concluded the WTO Agreements), "according to which 'by its nature, the Agreement establishing the World Trade Organisation, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts'".[363] While the Court refused to permit a Member State to rely on the WTO Agreements in challenging the legality of a Community measure, it reaffirmed the validity of the *Fediol* and *Nakajima* jurisprudence. Thus, it was "only where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules".[364]

The Court has reiterated its position in a number of later cases, including cases involving challenges by private individuals based on obligations under the WTO Agreements.[365] In the wake of considerable academic and judicial debate,[366] the Court has also rejected arguments, in the context of claims for compensation by firms affected by US trade sanctions, that the adoption of a decision by the WTO Dispute Settlement Body finding the Community in breach of its obligations under the WTO should be, alongside *Fediol* and *Nakajima*, a third exceptional circumstance in which parties could rely on the WTO Agreements before the European Courts.[367] The Court's jurisprudence on the WTO has inspired a great deal of commentary and criticism.[368] Central themes of this criticism have been the

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[361] *Ibid.*, at para. 46.
[362] *Ibid.*, at para. 47.
[363] *Ibid.*, at para. 48. As Mendez comments, note 234, at 97: "It would be naïve to suppose that the institutional stance is not of influence even if the ECJ was careful not to attribute a direct impact to the Council Decision".
[364] *Ibid.*, at para. 49.
[365] Joined Cases C-300/98 and 392/98 *Parfums Christian Dior* [2000] ECR I-11307; Case C-307/99 *OGT* [2001] ECR I-3159; Cases C-27/00 and 122/00 *Omega* [2002] ECR I-2569; C-189/99 *Schieving Nystad* [2001] ECR I-5851; C-491/01 *British American Tobacco* [2002] ECR I-11453.
[366] See the discussion in Koutrakos, note 263, at 290-295 and in Mendez, note 234, at 95; see also the Opinion of Advocate-General Alber in Case C-93/02 *Biret* (15 May 2003).
[367] Case C-377/02 *Van Parys* [2005] ECR I-1465 and Joined Cases C-120/06P and C-121/06P *FIAMM & Others* [2008] ECR I-6513. See Dani, "Remedying Legal Pluralism: the FIAMM and Fedon Litigation and the Judicial Protection of International Trade Bystanders" (2010) 21(2) *EJIL* 303.
[368] For a comprehensive list of the most important literature to 2003, see Eeckhout, note 212, at 292ff. Among the more recent literature, see e.g. Bronckers, "From 'Direct Effect' to 'Muted Dialogue': Recent Developments in the European Courts' Case Law on the WTO and Beyond" (2008) 11 *J. Int'l*

alleged inconsistency with the Court's jurisprudence on the direct effect of other international agreements and the essentially political reasons relied upon by the Court to deny direct effect to the WTO Agreements.[369] While it is not possible to consider the arguments in detail within the context of this overview, it may be noted that these themes highlight the strongly legalised EU approach to the implementation of international agreements, something which contrasts sharply with the approach of the Irish legal system.

b. Other Agreements

Although the GATT/WTO jurisprudence has long been considered an exception to the general willingness of the Court to grant direct effect to international agreements, more recent case-law cautions against such a categorisation. Still within the field of international trade law, in *Katsivardas*,[370] for example, the Court refused to grant direct effect to Article 4, the most favoured nation clause, of the Cooperation Agreement between the then EEC and the member countries to the Cartagena Agreement (Bolivia, Colombia, Ecuador, Peru and Venezuela). However, the Court's more cautious approach towards direct effect can also be seen in other areas.[371] In *Intertanko*,[372] which was a preliminary reference in the course of proceedings by certain shipping industry associations challenging the validity of Directive 2005/35/EC on ship-source pollution, the Court was asked to consider whether provisions of the Directive were invalid having regard to the provisions of the United

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Economic Law 885; Zonnekeyn, *Direct Effect of WTO Law: A Collection of Essays* (Cameron May 2008); Mendez, note 234; Arcuri and Poli, note 349. A leading and longstanding critic has been Petersmann: see e.g. Petersmann, "Multi-Level Judicial Trade Governance without Justice? On the Role of Domestic Courts in the WTO Legal and Dispute Settlement System" *EUI Working Paper* (2006/44).

[369] See e.g. Arcuri and Poli, note 349, at 5-7.

[370] Case C-160/09 *Katsivardas* (Judgment of 20 May 2010, not yet reported).

[371] *Ibid.*, paras. 43-45: "when Article 4 of the Cooperation Agreement was adopted, the member countries of the Cartagena Agreement were not yet all parties to the 1947 GATT. As the Court observed in paragraph 57 of the judgment in Van Parys, in relation to the Framework Agreement on Cooperation, the intention of the parties to that framework agreement was to extend the application of the system drawn up within the framework of the 1994 GATT to the member countries of the Cartagena Agreement, in order to grant them the benefit of the most-favoured-nation clause in Article I(1) of the GATT, without altering its scope. The same reasoning holds true for the Cooperation Agreement, since the drafting of Article 4 thereof clearly does not reveal an intention of the contracting parties to grant the three member countries of the Cartagena Agreement which were not yet parties to the 1947 GATT trade concessions going beyond those which they had granted to their GATT partners. It follows that the Court's decision in *Van Parys* as to the lack of direct effect of the most-favoured-nation clause in the Framework Agreement on Cooperation is also valid in relation to Article 4 of the Cooperation Agreement. In light of the foregoing, the answer to the question referred is that Article 4 of the Cooperation Agreement approved by Regulation No 1591/84 is not such as to confer on individuals rights upon which they might rely before the courts of a Member State."

[372] Case C-308/06 *Intertanko* [2008] ECR I-4057.

Nations Convention on the Law of the Sea (UNCLOS) and the 1973 International Convention for the Prevention of Pollution from Ships and its 1978 Protocol (MARPOL). In relation to MARPOL, which was not binding on the Community, as it was not a party to it, the Court held that the mere fact that Directive 2005/35/EC had the objective of implementing certain of its rules into Community law was not sufficient for the Court to review the Directive's legality in light of that agreement and, while the powers of the Community had to be exercised in accordance with international law, the provisions of MARPOL invoked did not appear to constitute rules of customary international law binding on the Community.[373] In relation to UNCLOS, to which the EC was a party, the Court held that it was binding on the Community and formed an integral part of its legal system.[374] However, the Court had to determine whether "the nature and broad logic of UNCLOS" precluded the examination of the validity of Directive 2005/35/EC in light of its provisions.[375] After setting UNCLOS's main features, the Court noted the balance struck between the interests of different groups of States within the Convention and that, while its provisions provided for "the establishment of substantive and territorial limits to [States'] respective sovereign rights",[376] individuals were "in principle not granted independent rights and freedoms by virtue of UNCLOS".[377] Having regard to these factors, UNCLOS did not "establish rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States, irrespective of the attitude of the ship's flag State"[378] and it followed that "the nature and the broad logic of UNCLOS prevent the Court from being able to assess the validity of a Community measure in the light of that Convention".[379] *Intertanko* illustrates that, besides the WTO Agreements, there are other international agreements to which the EU is a party, particularly those of a multilateral character, the provisions of which are not capable of being given direct effect within the EU legal system. Yet it is only as their provisions are invoked by litigants before the Court that their internal legal effects become clear. As in the case

[373] *Ibid.*, at paras. 47-51.
[374] *Ibid.*,, at para. 53.
[375] *Ibid.*,, at para. 54.
[376] *Ibid.*, at para. 58.
[377] *Ibid.*, at para. 59.
[378] *Ibid.*, at para. 64.
[379] *Ibid.*, at para. 65.

of the WTO Agreements, the Court's approach has elicited divergent responses from academic commentators.[380]

As the preceding sections show, the Court's jurisprudence on the direct effect of international agreements has focused on agreements concluded in the context of the EU's special bilateral relationships, on the one hand, and in the context of the WTO, on the other hand. Nevertheless, as other cases such as *Intertanko* clearly show, the array of international agreements to which the EU is party is much broader than those two categories. In order to have a more rounded picture of the implementation of international legal systems within the EU legal system, it is important to consider briefly certain other categories of agreement.

First, while the pillar structure under the pre-Lisbon Treaties has fallen away and much of the third pillar has been subsumed within the Treaty on the Functioning of the European Union (TFEU), there remains a vital distinction between the European Union when it is operating under the external action provisions of the TFEU and under the Common Foreign and Security Policy provisions of the Treaty on European Union (TEU). While there was initially some doubt about the capacity of the European Union to conclude international agreements, treaty amendments and evolving practice quickly confirmed that the EU could conclude international agreements under, and indeed across, the second and third pillars.[381] The Treaty of Lisbon confirms the capacity of the EU to conclude international agreements in all its fields of activity, including the CFSP. However, as discussed in Chapter 2, although it has expanded in its scope, the jurisdiction of the Court of Justice in respect of the CFSP, as defined in Article 275 TFEU, remains carefully circumscribed.[382] Prior to Lisbon, commentators noted that the legal effects of CFSP agreements were "largely unknown" although this did not mean that they had no effect within the EU legal order.[383] Article 216(2) now provides that "agreements concluded by the Union" bind the EU institutions and the Member States, thus bringing CFSP agreements within its embrace. However, as discussed in relation to

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[380] See Denza, "A Note on *Intertanko*" (2008) 33 *ELRev* 870, at 875 (expressing the view that the Court's treatment of direct effect was "clearly correct"); Mendez, note 234, at 99-103 (criticising the Court's approach and claiming that it raises the issue of the EU's commitment to international law).

[381] See Eeckhout, note 212, Chapter 5, and Wessel, "Cross-pillar Mixity: Combining Competences in the Conclusion of EU International Agreements", in Hillion and Koutrakos, note 263.

[382] See Chapter 2, Section III.D.

[383] Kaddous, note 212, at 299. See also Lavranos, note 212, at 25, who refers to "a lot of legal uncertainty ... as to the legal status and effect of such agreements in the European legal order" but suggests that the creation of a single legal personality "should remove differences". Of course, notwithstanding the creation of a single legal personality in the Treaty of Lisbon, many of the distinctive features of the CFSP remain extant.

agreements falling within areas of external action under the TFEU, this does not of itself resolve questions relating to the internal effects of international agreements. Notwithstanding the continued limits on jurisdiction in relation to the CFSP, there may be circumstances in which the Court of Justice will be called on to exercise jurisdiction over such agreements and to articulate their effects within the EU legal order, including possible direct effect in the case of provisions imposing obligations or conferring rights on individuals.

Secondly, certain international agreements are, as in Ireland, given effect through EU legislation. While this is also the case in respect of certain WTO obligations,[384] a particularly interesting example of this, at least from an Irish perspective, is the Aarhus Convention. While Ireland has signed this Convention, it has not, unlike the European Community and other Member States, approved or ratified the agreement. Nevertheless, prior to approving the Convention, the European Community adopted a number of legislative measures to give effect to the provisions of the Convention.[385] In some cases, the EU has even adopted legislation to give effect to international agreements to which it is not a party, a notable example being the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).[386]

Thirdly, like CITES, there are other international agreements which affect the EU, which "belong to the 'orbit' of the EC legal order",[387] but to which the EU is not party. In relation to the United Nations, for example, to which the European Union is not and cannot become a party,[388] the Treaties make reference to the United Nations

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[384] See Bourgeois and Lynskey, "The extent to which the EC legislature takes account of WTO obligations: jousting lessons from the European Parliament" in Dashwood and Maresceau, *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge University Press, 2008), at 202.

[385] See Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC; Regulation (EC) N° 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

[386] See e.g. Council Regulation (EC) No. 338/97 on the protection of species of wild fauna and flora by regulating trade therein (the Basic Regulation) and Commission Regulation (EC) No 865/2006 laying down detailed rules concerning the implementation of Council Regulation (EC) No 338/97 (the Implementing Regulation).

[387] Lavranos, note 212, at 44.

[388] See Article 4(1), United Nations Charter: "Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations."

Charter.[389] However, although the Court of Justice has recognised the special importance of the Charter, its provisions, and measures taken thereunder, such as United Nations Security Council Resolutions, do not enjoy direct effect within the EU legal system.[390] So too,in relation to the European Convention on Human Rights, although the Treaties have for some time made express reference to the Convention and they now provide for the EU's accession to the Convention,[391] the European Union is currently not a party to the Convention which is not formally binding upon it. Nevertheless, from the early days of its fundamental rights jurisprudence, the Court has continually affirmed the special significance of the Convention as a source of inspiration for the general principles of EU law.[392] As Craig and de Búrca succinctly state the position, "[w]hile the European Convention on Human Rights is not a formal part of EC law, it is the most common source of reference for fundamental EU rights".[393] Indeed, it might even be suggested that, notwithstanding that it was Ireland (alongside the other Member States), and not the EU, which was a party to the Convention, the Convention arguably enjoyed greater force within the EU legal system than in the Irish legal system, at least prior to the ECHR Act 2003.

iv. Conclusion

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[389] The most important references to the Charter are to be found in Article 3(5) TEU which provides, inter alia, that the EU "shall contribute … to the strict observance and the development of international law, including respect for the principles of the United Nations Charter" and Article 21 which lists "respect for the principles of the United Nations Charter and international law" as one of the principles guiding the EU's action on the international scene and states that it "shall promote multilateral solutions to common problems, in particular in the framework of the United Nations".

[390] See generally Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] ECR I-6351, discussed in Chapter 5, Section IV.C & D.

[391] Article 6(2) TEU: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties." Negotiations to this end are ongoing.

[392] See e.g. Case C-260/89 *ERT* [1991] ECR I-2925, at para. 10: "… it must first be pointed out that, as the Court has consistently held, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. For that purpose the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories (see, in particular, the judgment in Case C-4/73 *Nold v Commission* [1974] ECR 491, paragraph 13). The European Convention on Human Rights has special significance in that respect (see in particular Case C-222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 18). It follows that, as the Court held in its judgment in Case C-5/88 *Wachauf v Federal Republic of Germany* [1989] ECR 2609, paragraph 19, the Community cannot accept measures which are incompatible with observance of the human rights thus recognized and guaranteed".

[393] Craig and de Búrca, note 228, at 394.

As this review has shown, the determination of the effect of international agreements within the EU legal system is a complex process. Although the criteria by which this determination is to be made have been set out with reasonable consistency, their application depends in large part on the Court's evaluation of the international agreement and its specific provisions. As the case-law on the WTO exemplifies, the Court of Justice has regard to a broad range of legal and policy or political considerations in making this determination. While the Court of Justice has been generous in conferring direct effect on the provisions of the EU's bilateral agreements with other States, the provisions of which often reflect provisions in the European Treaties themselves, the extension of direct effect to other types of agreement, particularly multilateral agreements such as the WTO and UNCLOS, has been less straightforward. Although there is some force in the charges of selectiveness and inconsistency frequently made against the Court, the difficulty of its task must also be recognised. This task almost inevitably involves the Court in the consideration of political and policy considerations, matters which are more appropriately dealt with by the political organs of government. While the Court itself has long recognised that the political organs can stipulate the internal effect of an agreement in its provisions, in practice international agreements rarely make such provision and it falls to the Court to determine this issues.

At the same time, the decision as to whether or not an agreement has direct effect within the European Union legal order is not necessarily the end of the matter. Even where the Court is in principle willing to grant direct effect to an international agreement, implementing measures may nonetheless be required or the interpretation of its provisions may be less liberal than in the case of analogous provisions under the European Treaties. By contrast, in cases where the Court has refused to grant an international agreement direct effect, it has recognised that such an agreement may nonetheless have important indirect effects within the European Union legal order. Just as it is an oversimplification to classify the European Union legal system's approach to the implementation of international agreements as monist on the basis of Article 216(2) and the *Haegeman* principle, it is equally an oversimplification to classify that system as monist on the basis of its broad but qualified recognition of the direct effect of international agreements. The complexity of the process of implementation highlights the range of difficult issues which require to be dealt with in the context of the implementation of international agreements and once again demonstrates the limits of a monist-dualist dichotomy in understanding that process.

D. Assessment

While on its face the approach of the EU legal system is monist, in the sense that such agreements automatically form part of EU law upon their conclusion, the reality is that the Court of Justice plays a critical role in determining the internal status and effect of international agreements. Its jurisprudence has generally responded positively to the call for direct effect of international agreements. However, this is not universally the case, as the case-law on the WTO Agreements makes clear and the Court's 'twin-track' approach to the internal effect of international agreements has been much criticised.[394] However, what is most striking about the EU approach is not so much the outcome for specific international agreements as the extent to which the judicial organ, the Court of Justice, has the power to determine these questions, which, as stated at the outset, frequently involve political and policy considerations as well as those of a purely legal character. When one looks to a wider array of agreements, it is clear that the political organs retain an important role, for example, in the context of agreements concluded under the CFSP and agreements in areas such as environmental protection which frequently require specific implementing measures. However, as a general matter, the Court has taken a broad approach to its jurisdiction to determine issues arising in relation to the implementation of international agreements.

V. CONCLUSION

The implementation of international agreements within internal legal systems is a complex process. This complexity derives from the diverse range of obligations embodied in such agreements, as well as the flexibility which they generally allow to internal legal systems. In the legal systems of EU Member States, this complexity also derives from the internal constitutional structure of treaty-making and treaty implementation. In Ireland, for example, implementation now takes place within the context of a differentiated regime: for those agreements still falling within the scope of Irish law, one set of rules, dominated by Article 29.6 of the 1937 Constitution, applies; for those agreements falling within the scope of EU law, another set of rules, to be found in the Treaties and the jurisprudence of the European courts, applies; for

[394] Mendez, note 234, *passim*.

agreements falling within the scope of both Irish and EU law, both sets of rules may apply but the degree to which one or other set of rules applies ultimately depends on the perspective of the European courts.

Thus, the differences between the approaches adopted within the Irish and EU legal systems are of considerable importance, particularly at a time when an increasing number of international agreements are concluded by the EU and require implementation within the EU legal system. As already noted, the Irish and EU legal systems take fundamentally different starting points in their implementation of international agreements: whereas Article 29.6 of the 1937 Constitution excludes such agreements from forming part of Irish law in the absence of positive legislative action, the European Treaties, as interpreted by the Court of Justice in *Haegeman*, consider international agreements to form part of the EU legal order upon their conclusion and, while this does not inevitably mean that agreements will enjoy direct effect in that legal order, the Court has been generous in granting direct effect. In the case of many agreements concluded to date, the EU is a party alongside Member States which *prima facie* must comply with their internal constitutional requirements in respect of treaty-making and treaty implementation. However, where matters within such agreements fall within the scope of EU law, the EU is responsible for their implementation by its institutions and by Member States and Member States' constitutional processes of implementation – such as Article 29.6 of the 1937 Constitution – are sidelined. It is the Court of Justice which ultimately decides upon the internal effect of these agreements within the legal order of the European Union and its Member States. As described above, the Court has generally adopted a broad conception of its jurisdiction in this regard. In many cases, this will entail the direct effect and supremacy of international agreements, a radically different position from that which would prevail in the Irish legal system. The approach of the EU legal system to the implementation of international agreements thus contrasts with that of the Irish legal system in a more fundamental way: what in Ireland is reserved to the political process by Article 29.6 is, in the EU, largely determined by the judiciary.

While the Irish and EU legal systems diverge in fundamental ways in their implementation of international agreements, an analysis of both systems throws into sharp relief the inadequacy of the monist-dualist paradigm in explaining the interaction between international agreements and internal legal orders. In a system that is on its face dualist in its approach to international agreements, such as the Irish legal system, this does not prevent a high level of implementation of such

agreements within the system. Nor does it preclude those agreements which have not been implemented from having an indirect, but sometimes very important, influence on the legal system. Conversely, in a system that is on its face monist in its approach, such as the EU legal system, this does not of itself guarantee that international agreements will be fully implemented and applied with that system. In some cases, the provisions of such agreements by their nature will require further implementing measures. In other cases, where the system refuses direct effect, it may nonetheless recognise certain indirect effects, just as the Irish system does for non-implemented agreements. Thus, notwithstanding the very different starting points, which reflect different constitutional choices on the part of the Irish and EU legal systems, there is a surprising degree of convergence between the approaches taken to the implementation of international agreements in the Irish and EU legal systems. Perhaps what the examination of these systems ultimately shows is that the approach to implementing international agreements in internal legal systems, at a time when such agreements are of ever-greater number, diversity and complexity, demands a highly nuanced approach, an approach which defies the constraints of the monist-dualist dichotomy which has traditionally prevailed in this field.

While the effect of the European Union in other areas of Irish law has been long heralded, its effect on the implementation of international agreements has largely been neglected. However, as this chapter shows, the EU plays a highly important and increasing role in that process and, in so doing, it qualifies significantly the rule in, and role of, Article 29.6 of the 1937 Constitution. As the EU's role in international relations continues to evolve, the balance between the EU and its Member States in the field of treaty making and implementation is likely to tilt further towards the EU, which thus will continue to play a central role in the implementation of international agreements within the Irish legal system, as in the legal systems of all Member States.

CHAPTER 4.

IMPLEMENTATION OF CUSTOMARY INTERNATIONAL LAW IN THE IRISH LEGAL SYSTEM

I. INTRODUCTION

Customary international law is "the oldest and original source of international law".[1] Based on the practice of States, it is unwritten in character and its rules are capable of changing over time in line with that practice. As a result of these characteristics, the identification and application of customary international law can present considerable challenges within the international legal system. These challenges are even more acute within internal legal systems. Yet, notwithstanding the rise of treaty-making and other modes of international law-making, customary international law remains at the heart of international law.[2] As international law has extended its reach further within internal legal systems, the implementation of customary international law in those systems has retained its relevance. This chapter critically examines the implementation of customary international law within the Irish legal system and explores the effect of EU membership on this process.

The chapter opens with a definition of customary international law and a brief discussion of the issues to which it gives rise in its implementation within internal legal systems. It then turns to a detailed analysis of the approach to implementation adopted within the Irish legal system. This is followed by an analysis of the approach adopted within the European Union legal system. In both cases, the jurisprudence is sparse and characterised by a considerable degree of uncertainty. The conclusion then examines the effect of the European Union approach to implementation of customary international law on that adopted in the Irish legal system.

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[1] Jennings and Watts, *Oppenheim's International Law: Volume I* (9th ed., Longman, 1992), at 25. See also Kelsen, *Principles of International Law* (Rinehart & Co., 1952), at 304: "custom is the older and the original source of international law, of particular as well as of general international law".

[2] For a recent account with references to a wide range of areas of international law, see Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge University Press, 2010).

II. CUSTOMARY INTERNATIONAL LAW

Article 38.1 of the Statute of the International Court of Justice, which is widely regarded as the classic statement of the sources of international law, provides that:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> ....b. international custom, as evidence of a general practice accepted as law;

International custom, or customary international law, is the practice of States by which they consider themselves legally bound.[3] It is generally considered to be composed of two elements: first, the objective element of the practice or conduct of States which may take diverse forms (sometimes referred to as the *usus*); secondly, the subjective element of the belief or conviction of States that they are bound by this practice as a matter of law (the *opinio juris*), distinguishing this law from mere usage.[4]

In practice, both elements present considerable difficulties of definition. First, State practice is understood in broad terms: it encompasses positive statements or conduct, and omissions, whether in domestic or international fora, public or private.[5] Although it is clear that the level of support for a particular practice need not be universal, it must receive the near-uniform support of States.[6] International law recognises certain qualifications: for example, the concept of a 'persistent objector', a State which objects to a particular rule of customary international law in its formative stage;[7] or that certain custom may be of a regional or local character.[8] At the same time, there are also considered to be certain rules of customary international law from which no State can exempt itself: peremptory norms of general

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[3] The formulation of the *Restatement (Third) of Foreign Relations Law of the United States* (American Law Institute, 1990) is also of interest: it states, at § 102, that "customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation".

[4] See e.g. Brownlie, *Principles of Public International Law* (6th ed, Oxford University Press, 2003), at 7-10; Shaw, *International Law* (5th ed, Cambridge University Press, 2003), at 77-84; Cassese, *International Law* (2nd ed, Oxford University Press, 2005), at 157-162; Lowe, *International Law* (Oxford University Press, 2007), at 36-41.

[5] For general studies of the material sources of customary international law, see Ferrari-Bravo, "Méthodes de recherche de la coutume internationale dans la pratique des états" (1985) 192 *Recueil des cours* 233-330 and Mendelson, "The formation of customary international law" (1998) 272 *Recueil des cours* 155-410.

[6] See for example the decision of the International Court in *Colombia v. Peru (Asylum)* (1950) ICJ Reports 276-7, speaking of "a constant and uniform usage practiced by the States in question".

[7] On the 'persistent objector', see Stein, "The Approach of a Different Drummer: The Principle of the Persistent Objector in International Law" (1985) 26 *Harvard International Law Journal* 457.

[8] See for example the cases of *Colombia v. Peru (Asylum)* (1950) ICJ Reports 276 and of *Portugal v India (Right of Passage over Indian Territory)* (1960) ICJ Reports 39.

international law or rules having a *jus cogens* character.[9] However, generally speaking, in contrast to international agreements which bind only the parties which have expressly consented to be bound, customary international law binds *all* members of the international community.

Secondly, *opinio juris* – the subjective, psychological element of custom – is even harder to define and establish: in many cases, there will be little express acknowledgement of a practice's legally binding nature and it must be implied from the practice itself.[10] It is for this reason that certain scholars have suggested that this element of the definition of customary international law should be discarded.[11]

Although customary international law is defined by reference to the practice of States, which remain the central actors within the international legal system, States increasingly act on the international stage within and through international organisations. The European Union is the most highly developed form of regional international organisation. As its Member States have pooled their sovereignty in a growing number of areas of activity, including external relations, the EU has become a significant actor on the international plane in its own right and developed a wide-ranging practice in international law.[12] Thus, in many areas of international law, the Member States act through the EU and the practice of the EU is the practice of the Member States.[13] However, because it is not always possible to define precisely the allocation of competence between Member States and the EU in external relations, in certain circumstances, it may difficult to determine precisely to what extent the practice of the EU binds Member States.[14] Yet, in general terms, it is clear that, in a wide array of areas, whether or not the EU practice is formally binding on the

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[9] This category of norms has been recognised in Articles 53 and 64 of the Vienna Convention on the Law of Treaties and in Articles 40 and 41 of the ILC Articles on responsibility of States for internationally wrongful acts. See e.g. Lowe, note 4, at 59: "There are generally accepted examples: the prohibitions of the waging of aggressive war, and of genocide, and of slavery, and of piracy..... There are other more controversial candidates: the prohibition on racial discrimination (at least in the form of apartheid), the principles of self-determination of peoples and of permanent sovereignty over natural resources, and perhaps also the prohibitions on the acquisition of sovereignty over the high seas and outer space".

[10] As Lowe remarks, "States do not usually assert explicitly that their actions are (or are not) consistent with international law: explicit statements of *opinio juris* are rare": Lowe, note 4, at 40.

[11] See Mendelson, note 5.

[12] For an excellent overview of the EU's practice in international law, see Hoffmeister, "The Contribution of EU Practice to International Law" in Cremona ed, *Developments in EU External Relations Law* (Oxford University Press, 2008), at 37.

[13] The position will obviously be more complicated in the case of areas of so-called variable geometry (where States may opt in or opt out) or of enhanced cooperation among Member States as envisaged by the Treaty of Lisbon amendments.

[14] Lowe, "Can the European Community Bind the Member States on Questions of Customary International Law?" in Koskenniemi ed, *International Law Aspects of the European Union* (Kluwer, 1998) 149.

Member States, it will be an important influence on Member States' practice as a matter of international law.

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Customary international law is different from other sources of law and, in particular, international agreements, in that it does not come into being as a result of a deliberate, formal law-making process but instead through an accumulation of experience and practice.[15] Reflecting the decentralised nature of the international legal system, it is from the acceptance of a general practice by States, and not from any particular, posited text, that customary international law derives its binding force and authority.[16]

As a result, customary international law is subject to change in accordance with changes in this practice, and in States' attitudes, as reflected in the *opinio juris*. Although this provides an inbuilt mechanism for change in customary international law, change must be generally accepted before it binds States generally and the degree to which, and the pace at which it changes, thus depends on the attitude of States.[17]

These features have been recognised in an Irish context by Barr J. in the *ACT Shipping* case where it had been argued that recognition of customary international law would violate Article 15 which vested the exclusive legislative power in the Oireachtas:

> In my opinion Article 15, s. 2, sub-s. 1 of the Constitution does not inhibit the evolution of international customary law into Irish domestic law. It relates to

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[15] Of course, most treaties are not law-making in character: see Boyle and Chinkin, *The Making of International Law* (Oxford University Press, 2007), at 233: "Viewed simply from the perspective of the law of treaties, therefore, treaties are a source of rights and obligations for the parties; most were never intended to be law for all states".

[16] Kelsen, for example, distinguishes between legislation, which is "conscious and deliberate lawmaking", and custom, which is "unconscious and unintentional lawmaking". He continues: "In establishing a custom, men do not necessarily know that they create by their conduct a rule of law, nor do they necessarily intend to create law. The rule of law is the effect and not the purpose of their activity" and, later, "custom is a decentralized – legislation a centralized – creation of law": Kelsen, *Principles of International Law* (Rinehart & Co., 1952), at 308.

[17] Thus, change may be slow in many areas and it is for this reason that customary international law may be regarded as a conservative source of law. However, in other areas of rapidly increasing international cooperation, custom may form very quickly. Jennings and Watts give the continental shelf and exclusive economic zones as examples of this more rapid development: Jennings and Watts, note 1, at 30. Bin Cheng has referred to the phenomenon of 'instant custom' in the context of the international law of outer space: Bin Cheng, 'Custom: The Future of General State Practice In a Divided World', in R. St.J. Macdonald & Douglas M. Johnston eds, *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory*, (1983) 513, at 532. But see Boyle and Chinkin, note 15, at 21: "Despite assertions of 'instant' customary law, this mode of informal and unwritten law-making is inherently conservative and backward-looking because of its reliance upon existing state practice. Uncertainties about the existence and content of rules of customary international law allow opportunistic claims lacking any content in state practice or *opinio juris*".

> the "making" of laws for the State which, it provides, is a power exclusively reserved to the Oireachtas. Customary law is not made in the sense envisaged by Article 15, s. 2, sub-section 1. Customary international law evolves from a practice or course of conduct which in time has become widely accepted.[18]

While the executive arm of government plays a particularly important role in defining State practice, in its conduct of the State's international relations, the practice of the legislative and judicial organs of government may also be relevant depending on the field of international law.[19] Thus, customary international law cannot be easily reconciled with the concept of law-making within the modern democratic State based on the separation of powers. Yet the constitutions of many States, including Ireland, recognise customary international law and the notion of separation of powers in those constitutions must be understood in light of this express constitutional recognition. From an Irish perspective, in giving their seal of approval to the 1937 Constitution, the Irish people gave their approval to Ireland's acceptance, in Article 29.3, of the "generally recognised principles of international law", the State's "rule of conduct in its relation with other States". But, whether or not a State's constitution explicitly refers to, or accepts, international law, custom is binding on such a state as a matter of international law; it is a corollary of the membership of the international community. Thus, it is not something to which the executive or legislative or judicial organ of government may specifically sign up to, on the one hand, or renounce, on the other, although their practice may be important in determining its content. As Crawford has put it, "the problem of the coordination of international law and municipal law is not so much a question of whether as how and by whom"; "it is a problem of separation of powers; in some cases of appropriation of discretions".[20] The question of the implementation of custom within internal legal systems must be understood in this light. When it is so understood, the questions of who decides what constitutes customary international law, what

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[18] *ACT Shopping (PTE) Ltd. v. Minister for Marine (M.V. Toledo)* [1995] 3 IR 406, at 422. In *M.F.M. v M.C. & Ors* [2001] 2 IR 385, where it was suggested that the changing content of Article 29.3 could effect an amendment of the Constitution, O'Sullivan J. dismissed this possibility and showed less understanding of the nature of customary international law (at 397): "...if this were to be implied it could indeed give rise to a situation where an instrument solemnly adopted by the people and solemnly amended from time to time by the people could also from time to time be amended without such ratification. ... Such an interpretation would, in truth, upend the Constitution itself".

[19] The most obvious example of the practice of judicial organs lies in the field of immunities: see generally Fox, *The Law of State Immunity* (2nd ed, Oxford University Press, 2008). In the assertion of jurisdiction, national legislation can play an important role: see e.g. the Maritime Jurisdiction Act 1959 (noted by O'Higgins, "The Irish Maritime Jurisdiction Act, 1959" (1960) 9(2) *ICLQ* 325).

[20] Crawford, "General International Law and the Common Law: A Decade of Developments" (1982) 76 *ASIL Proc* 232.

hierarchical rank it has, and what effect it has within the internal legal system, take on considerable importance.

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The concept of customary international law is sometimes used interchangeably with the concept of general international law. Both concepts refer to the law which, in contrast to international agreements which generally bind only those who parties to them, binds all members of the international community. National constitutions frequently refer to 'general international law' or some variation of this term.[21] The phrase "generally recognised principles of international law" used in Article 29.3 of the Irish Constitution is one example of a more widely used concept.[22] Similarly, with the EU, a number of similar terms are often used interchangeably.[23]

Dominicé and Voeffray suggest that both of these sources comprise general international law:

> the term "general international law" designates both international custom and the general principles of law of Article 38.1(c) of the Statute of the International Court of Justice. In this sense, it is the equivalent of the expression "unwritten international law" sometimes used in doctrine but which is less common in international jurisprudence.[24]

Thus, general international law, which also encompasses the general principles of law referred to in Article 38(1)(c), is broader than customary international law.[25] In

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[21] See e.g. Article 10(1) of the Italian Constitution of 1946 ("the generally recognized principles of international law"); Article 25 of the German Basic Law of 1949 (the "general rules of public international law"); Article 28(1) of the Greek Constitution of 1975 ("the generally recognized rules of international law"); Article 8(1) of the Portuguese Constitution of 1976 refers to the "rules and principles of general or ordinary international law".

[22] Under the traditional common law doctrine, "the law of nations" formed part of the law of the land. The approach taken by the drafters of the Constitutions reflects that of those constitutions to which they referred in the course of the drafting process for comparative purposes: for example, the most closely analogous provision is that of Article 9 of the Austrian Constitution of 1920 which referred to the "generally recognized rules of international law" as being an integral part of federal law. In contrast to Article 29.3, Article 9 expressly regulates the position of general international law within the internal legal order. While the federal nature of the Austrian system might account to some extent for this difference, it is nonetheless of significance.

[23] Wouters and van Eeckhoutte cite references to "general rules of international law", "rules of (public) international law", "principles of international law", "public international law" and "international law" within EU case-law: see Wouters and van Eeckhoutte, "Giving Effect to Customary International Law through European Community Law" (Catholic University of Leuven Institute for International Law Working Paper No. 25/2002), at 7. The Court also refers to customary international law and general international law: see e.g. Case C□386/08 *Brita* (Judgment of 25 May 2010, not yet reported).

[24] Dominicé and Voeffray, 'L'application du droit international général dans l'ordre juridique interne', in Eisemann ed, *The Integration of International and European Community Law into the National Legal Order* (Kluwer, 1996), at 51 (author's translation).

[25] Indeed, it has been argued that general international law also encompasses certain multilateral treaties: Tunkin, "Is General International Law Customary Law Only?" (1993) 4(1) *EJIL* 534.

his early study, Symmons concluded, after referring to the general principles of law in Article 38.1(c), that "this source which is often more evidential of custom than a formal source together with customary international law itself, would most nearly approximate to the meaning of the vague phrase in Article 29.3 of the Constitution".[26]

The meaning and effects of the "general principles of law recognized by the civilized nations" has been the subject of much controversy.[27] Different commentators have considered the provision as referring variously to general principles of national law, of international law, of both national and international law and of legal systems generally. After conducting an extensive examination of the academic commentary and the case-law of the International Court and its predecessor, Pellet concludes that "the requirement of recognition of the general principles *in foro domestico* is the criterion which differentiates the principles of lit. (c) of Art. 38, para.1 from both equitable or moral principles and from the general principles of international law".[28] Thus, the provision appears to refer to principles common to domestic legal systems – such as basic procedural precepts dealing with issues such as litispendence, *res judicata* and principles such as *nemo iudex en causa sua* and *ex iniuria ius non oritur* – which are "transposable" to the international legal system.[29] In contrast to Article 38(1)(d) which refers to "subsidiary means of determination", the general principles of law form an independent source of international law.[30] However, while they may form an important element of the legal

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[26] See generally Symmons, "The Law Enforcement Commission Report and Article 29 of the Constitution" (1973) 8 *Ir Jur (ns)* 33, at 38. Note the argument of Connelly that the reference to "principles" in Article 29.3 is of significance because "one of the distinguishing features of principles is that they may conflict or compete with one another in their application to the same set of circumstances and that, when this happens, the person charged with determining the legal position, has necessarily to weigh the applicable principles in arriving at a conclusion": Connelly, "Non-extradition for Political Offences: A Matter of Legal Obligation or Simply a Policy Choice?" (1982) 17 *Ir Jur (ns)* 59, at 80.

[27] Akehurst, *A Modern Introduction to International Law* (5th ed, Allen & Unwin, 1984) noted that there was "little agreement about the meaning of the phrase": "Some say it means general principles of international law; others say it means general principles of national law. Actually there is no reason why it should not mean both; the greater the number of meanings which the phrase possesses, the greater the chance of finding something to fill gaps in treaty law and customary law - which was the reason for listing general principles of law in the Statute of the Court (international tribunals have employed it in both these senses)". Lowe describes these principles as a 'stop-gap' and notes that it is "only those general principles that are apt for translation onto the international plane that may be so applied": Lowe, note 4, at 87.

[28] Pellet, "Article 38" in Zimmerman, Tomuschat and Oellers-Frahm eds, *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, 2006), at 767.

[29] Pellet, note 30, at 772.

[30] Article 38(1)(c) "...nevertheless constitutes an important landmark in the history of international law inasmuch as the states parties to the Statute did expressly recognize the existence of a third source of international law independent of custom or treaty": Jennings and Watts, note 1, at 37-38.

framework and legal reasoning used in international tribunals, rarely are these principles applied directly or independently.[31]

Notwithstanding their distinct nature, it is often difficult, as a practical matter, to delineate neatly between general principles of law and customary international law. To further complicate matters, Brownlie, having questioned the value of strictly delineating the sources,[32] has also referred to the concept of "general principles of international law", which could be regarded as falling within either or both of these sources.[33] Insofar as the general principles of law are understood as referring to principles *in foro domestico* transposed into international law, as suggested above, while their formulation in national and international systems may differ and while they may be of relevance in the broader framework of analysis of an issue of international law, these principles clearly do not need to be re-transposed into the national legal system in order to take effect therein. Thus, it is primarily customary international law which falls to be applied within internal legal systems and which is accordingly examined in this chapter.[34]

Before examining the implementation of custom in the Irish and the EU legal systems, it must be emphasised that the relevance of custom within internal legal systems is, in practice, limited. In some fields, national courts have long played an important role in the development and enforcement of rules of customary international law, such as those governing the immunities of diplomats or states. Issues of customary international law will sometimes require determination as a preliminary or incidental matter in cases raising broader issues. Nevertheless, while customary international law "continues to play a primordial role in the regulation of relations between States", as Dominice and Voeffray observe, "in the internal order ...the function it plays is inevitably much reduced".[35]

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[31] *Ibid.*

[32] As Brownlie notes, "what is clear is the inappropriateness of the rigid characterisation of sources": Brownlie, note 4, at 18.

[33] *Ibid.* (suggesting that the phrase may be understood as referring to those principles of customary international law which no longer derive their authority directly from the practice of States and, so understood, this could refer to a wide array of principles deriving, for instance, from the UN Charter).

[34] For the purpose of this chapter, customary international law is regarded as forming part of general international law, however formulated, whether as "the law of nations" in the original formulation of the common law rule, "the general principles of international law" as in Article 29.3 of the 1937 Constitution, or "the general rules of international law" as it sometimes identified in the jurisprudence of the Court of Justice. Case 104/81 *Kupferberg* [1982] ECR 3641, at para. 18; Case C-61/94 *Commission v. Germany (International Dairy Arrangement)* [1996] ECR I-3989, at para. 30.

[35] Dominicé and Voeffray, note 24, at 51 (author's translation).

As emphasised in Chapter 1, the State is bound to respect international law, including customary international law, is responsible for the acts or omissions of its organs, including the courts, resulting in breaches of the law in accordance with the rules governing State responsibility, and is not entitled to plead internal law as an excuse for such breaches. These principles also apply, albeit in modified form, to international organisations such as the European Union. However, "...general international law leaves the arrangements of the relationship between international law and municipal law by way of a renvoi to municipal law and in this manner recognises the sovereignty and autonomy of organisation of the states".[36] Moreover, international law "does not impose its priority as such on municipal law"[37] or "contain any general rule according to which customary international law and treaty law are to be supreme in the sphere of municipal law and directly binding on State organs and citizens alike, and the risk of certain abuses may even to some extent reduce the desirability of such a rule".[38] If treaties only rarely offer guidance as to how they are to be given effect within internal legal systems, the position in respect of customary international law is even more stark. Combined with the limited occasions on which internal legal systems have to address directly the implementation of customary international law, this may go some way to explaining the high degree of uncertainty which characterises that process within both the Irish and the EU legal systems.

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[36] Wildhaber and Breitenmoser, *The Relationship between Customary International Law and Municipal Law in Western European Countries* (1988) 48 *ZaöRV* 163, at 164: "It demands to be implemented one way or another. But it is not concerned with the method of achieving this result". As Dominicé and Voeffray note, "in principle international law does not impose any particular obligations on States with regard to the integration of international norms in the domestic order, so that each State is free to organise this as it wishes": Dominicé and Voeffray, note 24, at 51 (author's translation).

[37] Wildhaber and Breitenmoser, note 36, at 164.

[38] Seidl-Hohenveldern, "Transformation or Adoption of International Law into Municipal Law" (1963) 12(1) *ICLQ* 88, at 89ff.

III. IMPLEMENTATION IN THE IRISH LEGAL SYSTEM

A. Introduction

The implementation of customary international law within the Irish legal system,[39] as in many other national legal systems, has been marked by confusion which is the result of two principal factors. First, and fundamentally, while Article 29 of the Constitution expressly refers to the "generally recognised principles of international law", which includes custom, it does not explicitly address the status or effect of this law within the Irish legal system. Secondly, on the relatively rare occasions on which issues of customary international law have come before the Irish courts, the courts have failed to address this basic problem of the relationship between Article 29.3 and the pre-existing rule at common law and have arguably compounded it by conflating the issue of legal basis with a number of related but distinct problems. These problems include the mode of implementation, the status or hierarchical rank of custom, and its effects within the legal system. In light of the confused state of the law, it is necessary to set out clearly the background to the implementation of custom within the Irish legal system.

Prior to 1922, the Irish legal system formed part of the wider legal system of the United Kingdom of Great Britain and Ireland in which the traditional common law rule - that "the law of nations ... was the law of the land" - prevailed.[40] For much of the late 19th and 20th centuries a vigorous debate raged about the implications of this rule and, specifically, whether the rule involved the automatic incorporation or adoption of customary international law into national law (which could be considered a monist approach) or whether it required specific domestic acts

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[39] With the exception of a number of case notes or commentaries on specific issues, and the treatment of the subject in constitutional law texts, the important work of Symmons is the sole contribution to scholarship in this area: see Symmons, note 27; Symmons, "The Incorporation of Customary International Law into Irish Law: Recent Developments and Suggestions" (1996) 3 *Ir Jur (ns)* 165; Symmons, "Ireland- Irlande" in Eisemann ed, note 25, 317, at 350-356; Symmons, "Suggestions for the Revision of Article 29.3" in *Report of the Constitution Review Group* (Stationery Office, 1996), 580 ("Suggestions"); Symmons, "The Relationship of International Law and Domestic Law in South Africa and Ireland: A Comparative Analysis" in Binchy and Sarkin eds, *Human Rights, the Citizen and the State: South African and Irish Perspectives* (Round Hall Sweet & Maxwell, 2001) 63, at 80-85; Symmons, "The Incorporation of Customary International Law into Irish Law" in Biehler, *International Law in Practice: An Irish Perspective* (Thomson Round Hall, 2005), at 111.

[40] The rule or maxim is generally traced to Blackstone: Blackstone, *Commentaries on the Laws of England*, Book IV, Chapter V: "the law of nations ....is here adopted in its full extent by the common law, and is held to be a part of the law of the land".

of transformation (which could be considered a dualist approach).[41] Although the debate rumbles on,[42] the doctrine of incorporation is widely recognised as "dominant".[43] Although there was little explicit consideration of custom in the Irish courts during this era,[44] that rule applied in equal measure within the Irish legal system which formed part of the whole.

With the Constitution of the Irish Free State 1922 (the 1922 Constitution), Ireland's independent legal system took shape. The 1922 Constitution made no express reference to international law but, in Article 73, it carried over the laws in force in the State prior to its taking effect subject to their consistency with its provisions. This was, as Kelly explains, "generally taken to be the vehicle on which the whole corpus of law used in Ireland was carried across the constitutional divide and formally continued in force in the new State, except to the extent that inconsistencies between it and the new Constitution might emerge".[45] Among those rules was the common law rule relating to the law of nations (or international law as it was then coming to be called) forming part of the law of the land. There was nothing in principle in the 1922 Constitution which was inconsistent with the carryover of this rule. During the Free State period, therefore, it was through the common law that customary international law formed part of the Irish legal system, essentially a continuation of the pre-existing position.

When the Constitution of Ireland 1937 (the 1937 Constitution) was enacted, its Article 50.1 served as a carryover provision, similar to Article 73 of the 1922 Constitution.[46] Thus, as it had been carried over by Article 73, the common law rule

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[41] See, for example, Lauterpacht, "Is International Law Really Part of the Law of England?" (1939) *Trans Grot Soc* 51, Collier, "Is International Law Really Part of the Law of England?" (1989) 38 *ICLQ* 924 and Capps, "The Court as Gatekeeper: Customary International Law in English Courts" (2007) 70 *Modern LR* 458. See also Jennings and Watts, note 1, at 56-58; Brownlie, note 4, at 41-45; Shaw, note 4, at 129-35; Shaheed Fatima, "Using International Law in Domestic Courts - Part III: Customary International Law" (2003) 8 *Jud Rev* 236.

[42] The debate has been reignited in the context of claims that certain crimes under customary international law may form part of the law by virtue of customary international law: see e.g. *R v. Jones* [2007] 1 AC 136, at 155 (Lord Bingham expressing his hesitation about accepting the proposition that the law of nations was part of the law of the land "in quite the unqualified terms in which it has often been stated"). See also Sales and Clement, "International Law in Domestic Courts" (2008) 124 *LQR* 38.

[43] See e.g. Shaw, note 4, at 134, referring to "the dominant incorporationist approach"; Brownlie, note 4, at 41, referring to the doctrine of incorporation as "the dominant principle"; Fatima, note 41, at 236, referring to this as "the dominant approach".

[44] Reference to international law in the Irish case-law of this era was rare. For an example, see *The Eolo* [1918] 2 IR 78.

[45] Hogan and Whyte eds, *JM Kelly: the Irish Constitution* (4th ed, LexisNexis Butterworths, 2004), at para. 8.2.82.

[46] Although there has been some dissent from the view that this provision – and its predecessor – carried over common law as well as statute, the better view appears to be that Articles 73 and 50 respectively include common law within their remit. If this were not so, it would raise "the problem of

could also be carried over by Article 50, subject to its consistency with the provisions of the 1937 Constitution. The complicating factor at this juncture was the inclusion in the Constitution of an express provision relating to international law.

In common with other constitutions drafted during the inter-war period, the 1937 Constitution expressly refers to international law.[47] Article 29 has been described as combining "declarations of general principle" with "working clauses" which lay down clear, legally binding and enforceable rules.[48] After affirming Ireland's "adherence to the ideal of peace and friendly cooperation amongst nations founded on international justice and morality" and "to the principle of the pacific settlement of international disputes by international arbitration or judicial determination", Article 29 referred in section 3 to Ireland's acceptance of the "generally recognised principles of international law", in section 4 to the executive power in external relations being vested in the Government, and in sections 5 and 6 to the position in respect of international agreements. In contrast to Article 29.6 which precluded international agreements from forming part of "the domestic law of the State" in the absence of legislation, Article 29.3 simply declared the State's acceptance of the generally recognised principles of international law "as its rule of conduct in its relations with other States" and did not explicitly address their status in Irish law. This provision presented a possible alternative legal basis for the implementation of customary international law within the Irish legal system to that which had traditionally prevailed under the common law. Was Article 29.3 merely a declaration of principle or a working clause with effects within the Irish legal system? What effect, if any, did it have on the carryover of the common law rule? It fell to the courts to answer these questions and to determine the legal basis of customary international law under the 1937 Constitution. This is the first and fundamental source of confusion which must be addressed in an examination of custom within the Irish legal system. Because of the extent of the confusion which

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the source of validity of non-statutory law of pre-1922 origin, if this body of law cannot rely for its survival on the continuance provisions of the old Article 73 and the present Article 50": Hogan and Whyte eds, note 45, at para. 8.2.100.

[47] Although the 1937 Constitution was drafted considerably later than most of the constitutions of the inter-war period, the drafters studied those constitutions in their preparation of the draft Constitution: see e.g. Keogh and McCarthy, *The Making of the Irish Constitution 1937* (Mercier Press, 2007), at 99-100. De Visscher commented that it was not surprising that the generalization of the principle (that international law was the law of the land) by way of judicial decision "resulted in its formal incarnation by way of constitutional provision in the aftermath of World War I"; the constitutions of Germany, Austria and Estonia which did so had not innovated but set in stone an old judicial practice: de Visscher, "Les tendances internationales des constitutions modernes" (1952) 80 *Recueil des cours* 511, at 529.

[48] This is the terminology employed by Gavan Duffy P. in the case of *The State (Duggan) v. Tapley* [1952] IR 62, at 68.

has arisen, it is necessary to retrace in some detail the consideration of this issue in the Irish courts.

B. Legal Basis for Implementation

In the first cases touching upon customary international law which followed the enactment of the 1937 Constitution, there was no express consideration of the legal basis of custom within the Irish legal system.[49] In *McEvoy v. Owners of S.S. Otto*,[50] for example, where the Irish courts refused to recognise the claim of the USSR to certain ships owned by persons from Estonia and Latvia which the USSR had purported to nationalise, there was a lengthy and valuable examination of the relevant principles of international law, much, but not all, of which was by reference to the common law.[51] However, the place of custom in Irish law was assumed without any discussion of its legal basis. The first reference to that issue is to be found in the former Supreme Court's decision in *Saorstat and Continental SS. Co. v. de las Morenas*.[52] In that case, the plaintiff sued the defendant, a colonel in the Spanish Army who had come to Ireland as head of a Government-appointed commission to buy horses for the Spanish Army, for breach of contract and was met with a motion to set aside the proceedings on the basis of sovereign immunity. Although it dismissed that motion on the facts of the case, the Supreme Court considered the law governing sovereign immunity in some detail. In identifying this law, the Court drew heavily upon the common law, as in the earlier *McEvoy* case.[53] After conducting his examination of the law, O'Byrne J. stated:

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[49] An issue of customary international law arose tangentially in *Norton v. General Accident, Fire and Life Assurance Co.* [1940] 74 ILTR 123. In that case, the High Court allowed the plaintiff, whose son had been injured when the bus in which he was travelling collided with the car of the then U.S. Ambassador, to sue the insurer under s.78 of the Road Traffic Act 1933 which provided for recourse against the insurer directly in cases where, *inter alia*, the Court was satisfied that, *inter alia*, "it was for other reasons just and equitable that such an application should be granted". The plaintiff had originally sued the Ambassador who had left the jurisdiction by the time he entered an appearance without prejudice to his right to raise his diplomatic privilege. In coming to his decision that it was just and equitable to grant the application, Maguire J. (at 124) had regard to the fact that diplomatic privilege exempted its subject "from local jurisdiction only and not from legal responsibility".

[50] *McEvoy v. Owners of S.S. Otto* [1942] IR 148.

[51] In addition to the reference to U.S. and English jurisprudence, the High Court (Hanna J.) also refers extensively to "the writings on public international law of distinguished jurists": [1942] IR 148, at 166.The judgment of the High Court, if arguably ahead of its time (see *Government of Canada v. Employment Appeals Tribunal* [1992] 2 IR 484, at 497), continues to rank as one of the finest considerations of an issue of customary international law in the Irish case-law.

[52] *Saorstát and Continental SS. Co. v. de las Morenas* [1945] IR 291.

[53] *McEvoy v. Owners of S.S. Otto* [1942] IR 148.

> The immunity of sovereign States and their rulers from the jurisdiction of the Courts of other States has long been recognised as a principle of international law, and must now be accepted as a part of our municipal law by reason of Article 29, para. 3, of our Constitution, which provides that Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States.[54]

This passage clearly considers the effect of Article 29.3 as being to make the principles of international law, such as that of sovereign immunity, part of Irish law. In its reference to their "now" being accepted, it also appears to suggest Article 29.3 as a novel legal basis for the principles of customary international law. However, as the case was decided on the basis that the defendant was not entitled to rely on any such immunity, this dictum is clearly *obiter*.[55]

A similar approach to Article 29.3 is evident in *The State (Duggan) v. Tapley*.[56] In that case, the prosecutor, who was being transferred to face criminal charges in the United Kingdom, argued that the generally recognised principles of international law, which were made part of Irish law by Article 29.3, prohibited his surrender under the system of backing of warrants then in place under section 29 of the Petty Sessions (Ireland) Act 1851. After an extensive discussion of the relevant principles of international law, Maguire C.J., for the Supreme Court, rejected the argument on its merits but observed that, even if the rule invoked had been established, "the question would then arise whether the said [provision] failed to continue in force or whether it did continue in force except in so far as it contravened any recognised principle of international law".[57] While again clearly *obiter*, this comment foresees the possibility that a finding of breach of the generally recognised principles of international law could affect, in whole or in part, the continuing validity of the relevant statutory provisions. In other words, a generally recognised principle of international law could be invoked to challenge the validity of a statutory provision.

However, in subsequent cases, the courts adopted a far more restrictive approach to Article 29.3. In *Re Ó Laighléis*,[58] a challenge to the applicant's detention under the Offences Against the State Act 1939 based, *inter alia*, on Article 5 of the European Convention on Human Rights, the applicant argued that this provision

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[54] *Saorstát and Continental SS. Co. v. De Las Morenas* [1945] IR 291, at 298.
[55] See *Government of Canada v. Employment Appeals Tribunal* [1992] 2 IR 484, at 497.
[56] *The State (Duggan) v. Tapley* [1952] IR 62.
[57] [1952] IR 62, at 85.
[58] *Re Ó Laighleis* [1960] 1 IR 93.

could take effect through Article 29.3, which reproduced the pre-existing common law under which the "principles ...commonly accepted as binding by civilised nations became part of the domestic law unless they could be shown to be contrary to it".[59] Maguire C.J., for the Court, roundly rejected this argument based on Article 29.3, which, he held, along with Article 29.1, "clearly refer only to relations between states and confer no rights on individuals".[60] According to this interpretation, which seemed to diverge significantly from that implicit in his decision in *Tapley's Case*, Article 29.3, being confined to inter-State relations, could not form the basis of a challenge by an individual to a provision of Irish law in the Irish courts. The Court proceeded to consider the position at common law, noting that "the principle of incorporation" relied upon applied "to such parts of international law as are based on universally recognised custom and not to such parts as depend on convention".[61] Furthermore, and fatal to the applicant's argument even on its own terms, "inconsistency with municipal law is... a ground upon which the common law rejects the principle of international law".[62] Earlier, in the High Court, Davitt P. had taken a not dissimilar view of the position at common law: "apart from any provision of the Constitution", he stated, somewhat cryptically,[63] "the position would appear to be that the rules of international law are not part of the domestic law, except in so far as they have been made so by legislation, judicial decision, or established usage" and "to that extent its rules may be applied by the Courts so long as they are not in conflict with an enactment of the Legislature or a rule of common law".[64] Thus, in *Ó Laighléis*, there was a clear shift in the courts' understanding of the legal basis for custom within the Irish legal system: having confined Article 29.3 to the realm of inter-State relations, the basis for custom, if any, appeared to be through the common law and only insofar as there was no conflict with other rules of Irish law.

In *The State (Sumers Jennings) v. Furlong*,[65] a challenge to Part III of the Extradition Act 1965 by reference to Article 29.3, Henchy J., as a member of the Divisional High Court, followed the approach of Maguire C.J. in *Re Ó Laighléis*, concluding that Article 29.3 gave "no standing to the prosecutor to assert that Part

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[59] *Re Ó Laighleis* [1960] 1 IR 93, at 123.
[60] [1960] 1 IR 93, at 124.
[61] *Ibid.*
[62] *Ibid.*
[63] The opening clause of Davitt P.'s sentence ("Apart from any provision of the Constitution") raises the question of the relationship of Article 29.3 with "the position" as expressed in the remainder of the sentence. This is not addressed elsewhere in the High Court judgment. The nature of the argument based on Article 29.3 appears to have been different before the High Court and the Supreme Court.
[64] [1960] 1 IR 93, at 103.
[65] *The State (Sumers Jennings) v. Furlong* [1966] 1 IR 183.

III of the Extradition Act, 1965, is unconstitutional and in fact, if the conflict or repugnancy alleged exists, it could not give rise to an unconstitutionality in the state".[66] Moreover, Henchy J. considered that "section 3 of Article 29 ... was not enacted, and is not to be interpreted in these Courts, as a statement of the absolute restriction of the legislative powers of the State by the generally recognised principles of international law".[67] Citing the Irish provision of the text, he stated that "the section merely provides that Ireland accepts the generally recognised principles of international law as a guide (*ina dtreoir*) in its relations with other states".[68] This decision extended the approach of the Supreme Court in *Ó Laighléis*: not alone was Article 29.3 confined to the realm of inter-State relations, the principles which the State expressly accepted merely provided for guidance for the State rather than any legally binding constraint on its activity. Notwithstanding the fact that such principles bound all States as a matter of international law, the decision appeared to challenge the legally binding character of the "generally recognised principles of international law".

By this time, it was clear that two competing visions of Article 29.3 had developed. On the one hand, O'Byrne J.'s dictum in *de las Morenas* envisaged that this provision operated so as to make the generally recognised principles of international law part of Irish law. On the other hand, Maguire C.J.'s dictum in *Ó Laighléis* precluded that provision from being relied upon by individuals in the Irish courts and appeared to consider that, if the principles of international law were to have any place within Irish law, it was by virtue of the common law which only recognised that place subject to any countervailing provisions of Irish law. As extended by Henchy J. in *Sumers Jennings*, the principles accepted in Article 29.3 were merely guidelines for the State in its international relations.

It was some time before these issues came before the Irish courts again. However, the divergent conceptions of Article 29.3 came to the surface in another forum, the Law Enforcement Commission, a body of distinguished legal experts established by the British and Irish Governments to consider means by which offences committed in one jurisdiction could be tried or enforced in the other jurisdiction. In the Commission's Report,[69] there was a strong difference of opinion

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[66] [1966] 1 IR 183, at 190.
[67] *Ibid.*
[68] *Ibid.*
[69] *Report of the Law Enforcement Commission* (hereinafter *Report*) (Cmnd. 5627, H.M.S.O, 1974), at 41. The Report was also published in Ireland as Prl.3832. See generally Symmons, note 27. On the broader question of extradition for political offences from an Irish perspective, see Connelly, "Non-

between the Irish and British members of the Commission as to whether an alleged rule of customary international law protected by Article 29.3 would preclude the extradition of persons charged with political offences. According to the Irish members (one of whom was Henchy J.),[70] the generally recognised principles of international law were "carried into Irish law to the extent set out in the provisions of Article 29.3", which was "in terms of an express constitutional commitment on the part of the State", such that "the courts can intervene to set aside any executive or legislative act which contravenes this or any other constitutional provision".[71] In the context of Henchy J.'s dictum in *Sumers Jennings* to the effect that Article 29.3 was merely a guide in the State's international relations, the Irish members expressed the view that there was no conflict between the Irish and English texts: "as a guide", which was a "directing principle or standard", was the literal translation of "ina dtreoir", which term was used in the official Irish language texts of European Treaties for the English term "directive".[72] A footnote to the Irish opinion indicated that Henchy J.'s opinion was "based solely on the conclusion that if the constitutionality of the proposed legislation were challenged in appropriate litgation (e.g. pursuant to a reference made under Article 26 of the Constitution), it is not possible to advise that the legislation would not be held to be repugnant to Article 29.3 and therefore invalid".[73] The Irish members took the view that the suggested change to extradition law to allow for the extradition of persons accused of political offences should not be recommended on the ground, *inter alia*, that any such legislation or international agreement would be in breach of a generally recognised principle of international law.[74] The British members took a contrary view, citing *Ó Laighléis* and *Sumers Jennings*, and concluding that domestic Irish legislation could not be invalidated as unconstitutional on the ground of actual or alleged inconsistency with the generally recognised principles of international law.[75] The Commission ultimately recommended that each jurisdiction should enact legislation allowing its courts to exercise extra-territorial jurisdiction to try persons arrested in

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extradition of Political Offenders: A Matter of Legal Obligation or Simply A Policy Choice?" (1982) 17 *Ir Jur (ns)* 59.

[70] The others were Walsh J. (who was senior counsel for the State in *Ó Laighléis*), Thomas A. Doyle S.C., and Declan Quigley. The British members were Lowry L.C.J., Scarman L.J., Sir Kenneth Jones and J.B.E. Hutton Q.C.

[71] *Report*, note 69, at 22.

[72] *Report*, note 69, at 23.

[73] *Report*, note 69, at 14: "That conclusion "would be unaffected if the words "ina dtreoir" in the Irish version ... be read (as it has been suggested that they should) as having a less restrictive connotation than the corresponding words ("rule of conduct") in the English version".

[74] *Report*, note 69, at 24.

[75] *Report*, note 69, at 27.

its jurisdiction for scheduled offences committed in the other jurisdiction and providing for the taking of evidence on commission.[76] Interestingly, in the course of a reference of the relevant Irish legislation by the President to the Supreme Court under Article 26, the Supreme Court relied on customary international law in support of the State's power to legislate with extra-territorial effect.[77]

Although the Law Enforcement Commission highlighted the uncertain state of customary international law within the Irish legal system, when the matter next came before the Court, this uncertainty lingered. In the *Government of Canada* case,[78] the notice party, who had been dismissed from his employment as a driver at the Canadian Embassy in Dublin, brought a claim under the Unfair Dismissals Act before the Employment Appeals Tribunal. The Government of Canada, having unsuccessfully challenged the Tribunal's jurisdiction on the basis of its sovereign immunity from suit, sought judicial review of the Tribunal's decision. On appeal to the Supreme Court, O'Flaherty J. examined the development of the doctrine of sovereign immunity, concluding that the doctrine now existed in a restrictive rather than an absolute form, applying to a foreign State's public but not private acts (*jure imperii* but not *jure gestionis).* On the facts of the case, the Court held that the doctrine did apply to the notice party's claim on account of the "trust and confidentiality that is reposed in the driver of an embassy car".[79] Although he referred to the discussion of the substantive issue in the *de las Morenas* case, O'Flaherty J. did not specify the basis on which the doctrine of restrictive sovereign immunity was founded in Irish law. Whatever its status, it served to preclude the notice party's statutory claim. In his judgment, Hederman J. stated that the doctrine of sovereign immunity was "one of the generally recognised principles of international law which by Article 29, s.3 of the Constitution Ireland has accepted as its rule of conduct in its relations with other States" and, on this basis, he saw "no reason to differ from the view expressed on the general position by O'Byrne J." in

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[76] See *Report of the Law Enforcement Commission* (Cmnd. 5627, H.M.S.O, 1974), at 41. This led to the enactment of the Criminal Law (Jurisdiction) Act 1976 in Ireland. In the United Kingdom, see Criminal Jurisdiction Act 1975.

[77] *Re Article 26 and the Criminal Law (Jurisdiction) Bill* [1977] IR 129. The Court upheld the validity of the Bill, rejecting *inter alia* the argument that Articles 2 and 3 of the Constitution prohibited extra-territorial legislation in relation to matters occurring in Northern Ireland by reference to the power of sovereign States to legislative with extra-territorial effect under international law: [1977] IR 129, at 149. See Symmons, "The Criminal Law (Jurisdiction) Act 1976 and International Law" (1978) 13 *Ir Jur (ns)* 36.

[78] *Government of Canada v. Employment Appeals Tribunal and Burke* [1992] 2 IR 484. For an excellent review of the issues in the case, see Heffernan, "International Law – State Immunity – Case and Comment" (1992) 14 *DULJ* 160. See also Anderson, "Par in Parem Non Habet Imperium – the Problem of Foreign Sovereign Immunity: An Irish Perspective" (1997) 15 *ILT* 200.

[79] [1992] 2 IR 484, at 500.

the *de las Morenas* case.[80] Hederman J. proceeded to note "that the Oireachtas has never sought to qualify or modify this position",[81] clearly indicating that, notwithstanding O'Byrne J.'s *dictum* that they were made part of Irish law by Article 29.3, the Oireachtas had the power to qualify or modify those principles. McCarthy J., while reserving for another day the question of the true construction of Article 29.3 and specifically whether a claim under the Unfair Dismissals Act fell within the meaning of the section, nonetheless made an interesting observation on the position in Irish law. In relation to the facts of the case before the Court, he stated that "[w]hatever the implications may be in domestic law, whatever the rights might, at first sight, arise in respect of the Unfair Dismissals Act, unless it can be shown that there is a conflict with some private constitutional right, that matter is entirely governed by whatever are established to be the generally recognised principles of international law".[82] Thus, notwithstanding the disclaimer, this judgment clearly envisaged only a conflict with a private constitutional right as potentially affecting the applicability of this generally recognised principle of international law, a position that would arguably make most sense if those principles were of constitutional status. The alternative interpretation is that the doctrine of sovereign immunity forms part of the common law, operating as an implied limitation on statutory and constitutional rights.

In the later case of *McElhinney v. Williams*,[83] the Supreme Court rejected a challenge to the defendant's invocation of sovereign immunity on the grounds that it did not apply where the State claiming immunity had by its agents, acting within the sphere of governmental activity, committed tortious acts causing personal injuries and where it contravened any of the plaintiff's constitutional rights. The doctrine of sovereign immunity, as recognised in Irish law, appeared to operate as a bar to all claims, including those of a constitutional nature. Like the *Government of Canada* case, however, this case does not resolve the difficult issue of the legal basis of such customary rules within the Irish legal system.

Although it was coming closer to the surface, the tension between Article 29.3 and the common law was not confronted in the sovereign immunity cases. In

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[80] [1992] 2 IR 484, at 490.
[81] *Ibid.*
[82] [1992] 2 IR 484, at 491-492.
[83] *McElhinney v. Williams* [1995] 3 IR 382. This case was later the subject of proceedings before the European Court of Human Rights, which rejected the claim that the principle of state immunity constituted a breach of the applicant's right of access to the courts under Article 6(1) of the Convention: see *McElhinney v. Ireland* (2002) 34 EHRR 13. See also *Schmidt v. Home Secretary* [1997] 2 IR 121.

ACT Shipping (PTE) Ltd. v. Minister for the Marine,[84] the plaintiff, the owner of a cargo vessel which had sought but was refused entrance to Irish territorial waters and was later beached in England, sought damages for negligence against the State and claimed that the Minister's decision to refuse entrance was in contravention of the vessel's right of refuge in customary international law. The defendants raised a preliminary issue as to whether the decision of the Minister gave the plaintiff, a foreign company, a right of redress against the State. To determine this issue, Barr J. undertook a detailed consideration of the status of customary international law in Irish law, concluding that "the general position in Irish law would appear to be that established principles of customary international law may be part of Irish municipal law provided that they are not contrary to the provisions of the Constitution, statute law or the common law".[85] This conclusion was based on the dictum of Davitt P. in the High Court in *Ó Laighléis*. On this basis, Barr J. stated that any issue, including a claim for damages, arising on foot of these principles was "justiciable in the Irish domestic courts" and the State was "answerable to an injured party for wrongdoing by any state body relating to such a custom or practice".[86] This position was not undermined by Article 15.2, because customary international law was "not made in the sense envisaged" by that provision.[87] Nor was that position undermined by Article 29.3 as interpreted by the Supreme Court in *Ó Laighléis*. According to Barr J., the instant case raised a different issue from that in *Ó Laighléis*, namely "the absorption of international customary law into Irish domestic law, a process which, *per se*, is not contrary to Article 29, section 3".[88] After considering the right to refuge under customary international law invoked by the plaintiff, which the Court found was not absolute, Barr J. concluded that the State had a right to refuse refuge to the vessel in the circumstances of the case and that the Court should not interfere with the Minister's decision which had been made *intra vires*. This was the first case to address directly the two different possible legal bases for custom in Irish law. In so doing, Barr J. clearly differentiated between Article 29.3 and the common law. In light of the restrictive interpretation which had been placed on Article 29.3, and

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[84] *ACT Shipping (PTE) Ltd. v. Minister for the Marine* [1995] 3 IR 406. For an analysis of this case, see Gaffney, "The Status of International Customary Law in Irish Domestic Law: A Review of the 'Toledo' Case" (1996) 14 *ILT* 192.

[85] [1995] 3 IR 406, at 422-423.

[86] [1995] 3 IR 406, at 421.

[87] [1995] 3 IR 406, at 422.

[88] [1995] 3 IR 406, at 421: "The plaintiff is not seeking redress against the State in international law, but in domestic law on the premise that the prima facie right of a foreign ship to the benefit of a port or anchorage of refuge in an adjacent state has in time evolved into Irish domestic law from customary international law".

notwithstanding the elements in the case-law apparently to the contrary, the Court considered that that provision was not concerned with the "absorption of international customary law into Irish law". Echoing *Ó Laighléis*, the Court held that it was through the common law that custom formed part of Irish law and could be relied upon before the Irish courts, subject to any conflict with other provisions of Irish law. Thus, notwithstanding the "express commitment" in Article 29.3, the legal basis for custom in Irish law, as it emerged from *ACT Shipping*, was the same as it had been during the Free State era and even prior to independence.

The outright rejection of Article 29.3 as a legal basis for custom within the Irish legal system came in *Kavanagh v. Governor of Mountjoy Prison*.[89] In that case, the applicant sought to challenge his conviction for certain offences before the Special Criminal Court on the basis of the views of the Human Rights Committee established under the Optional Protocol to the International Covenant on Civil and Political Rights that the State had failed to demonstrate that the decision to try the applicant before that Court was based on reasonable and objective grounds, in violation of his right under Article 26 of the Covenant to equality before the law and to equal protection of the law. Having regard to the fact that the Covenant did not form part of Irish law by reason of Article 29.6, the applicant, in a manner reminiscient of *Ó Laighléis*, sought to argue that the right to equal treatment embodied in Article 26 was a right under customary international law. However, with a view to invalidating the applicant's conviction under Irish law, the applicant went further than in *Ó Laighléis*, arguing that Article 29.3 "constitutionalised" the general principles of international law, including the customary international law right to equal treatment.[90] In the High Court, Finnegan J. expressed doubt as to the correctness of Barr J.'s holding in *ACT Shipping* that an individual could rely on customary international law on the basis that this appeared to him to be "contrary to the statement of the law in *In re Ó Laighléis*", which the Court was bound to follow, and, referring to Article 29.3, suggested that the right in question in that case "must be justiciable only at the suit of the State in which the vessel concerned is registered". This dictum ignored the distinction drawn by Barr J. between the common law, on the one hand, and Article 29.3, on the other. In essence, the Court conflated the alternative legal bases. On appeal to the Supreme Court, the position at common law was not addressed. However, the Supreme Court upheld the High

[89] [2002] 3 IR 97.
[90] [2002] 3 IR 97, at 113-114, 122 and 127.

Court's decision and concluded that, even assuming that such a right was a generally recognised principle of international law, the applicant's argument must fail. The applicant's difficulty was not "in the quality of the principle of equality" but in "the wording of the constitutional provisions".[91] Fennelly J. continued:

> The obligation of Ireland to respect the invoked principles is expressed only in the sense that it is to be "its rule of conduct in its relations with other States." It is patent that this provision confers no rights on individuals. No single word in the section even arguably expresses an intention to confer rights capable of being invoked by individuals.[92]

In respect of *Ó Laighléis*, this decision remained the law and had "stood the test of time because the words that it interpreted are clear beyond argument and do not admit of any other construction".[93] The echoes of *Ó Laighléis* were apparent not alone in the judgment but in the arguments made before the Court. While counsel for the applicant adopted a creative approach to the difficulty created by that authority – arguing that, while *Ó Laighléis* may not have been wrongly decided at the time, the position of the individual in international law had since radically changed so as to allow him/her *now* to rely directly on the principles of international law accepted in Article 29.3[94] – it was clear that, as in *Ó Laighléis*, the invocation of the generally recognised principles of international law ("equality before the law" defined almost exclusively by reference to the Human Rights Committee's views on Article 26 of the Covenant) was an attempt to overcome the obstacles imposed by the fact that not only had the Covenant not been incorporated in Irish law, bringing Article 29.6 into play, but the 1937 Constitution contained an analogous right of more limited scope, bringing the equality clause in Article 40.1 into play too. However, in light of its reliance on *Ó Laighléis*, which disposed of the applicant's argument, the Court did not consider it necessary to consider the merits of the claim based on customary international law but instead simply assumed its correctness for the sake of the applicant's argument.[95] In terms of the legal basis of custom within Irish law, while

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[91] [2002] 3 IR 97, at 126.
[92] *Ibid.*
[93] [2002] 3 IR 97, at 126-127.
[94] [2002] 3 IR 97, at 113.
[95] "For the purposes of this analysis, it can be assumed without deciding that the applicant is correct in his contention that the principle of equal treatment before the law has become a generally recognised principle of international law and even that its scope and content has expanded sufficiently since *In re Ó Laighléis* [1960] I.R. 93 was decided to encompass the applicant's treatment at the hands of the third respondent. It can even be assumed, again without so deciding, that the principles of international law, which Article 29.3 requires the State to respect, include the rights claimed by the applicant.": [2002] 3 IR 97, at 126.

the Supreme Court did not address the position at common law as Barr J. had in *ACT Shipping*, it clearly rejected the argument that custom enjoyed a legally enforceable constitutional status at the behest of individuals through Article 29.3.

Most recently, in *Horgan v. An Taoiseach*,[96] the plaintiff challenged the constitutionality of the Government's decision to allow the use of Shannon Airport as a stop-over for US aircraft engaged in military action against Iraq on the ground that it was in breach of generally recognised principles of international law in relation to the conduct of a neutral State vis-à-vis belligerent States. The High Court was "prepared to hold ...that there is an identifiable rule of customary law in relation to the status of neutrality whereunder a neutral State may not permit the movement of large numbers of troops or munitions of one belligerent State through its territory *en route* to a theatre of war with another".[97] In considering the effect of such a rule, Kearns J. (as he then was) set out certain basic principles[98] and addressed some of the issues which had arisen in the case-law, citing *ACT Shipping*,[99] *Ó Laighléis*,[100] the *Government of Canada* and *McElhinney* cases,[101] and *Kavanagh*,[102] before summarising what it considered it to be the position: "principles of international law enter domestic law only to the extent that no constitutional, statutory or judge-made

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[96] [2003] 2 IR 468.

[97] [2003] 2 IR 468, at 505.

[98] *Ibid.* Kearns J. began as follows: "One may begin by saying that established principles of customary international law may be incorporated into Irish domestic law providing that they are not contrary to the provisions of the Constitution, statute law or common law. (Brownlie: Public International Law (5th ed.) p. 42)". The citation of Brownlie for this as a proposition of Irish law is curious.

[99] *Ibid.* Following Barr J. in *ACT Shipping*, Kearns J. took the view that Article 15.2.1 did not "per se inhibit the incorporation of customary international law into Irish domestic law, subject to the proviso that there is no resultant conflict with the Constitution, statute law or common law". The reference to *ACT Shipping* (in which Barr J. referred only to Davitt P.'s judgment in *Ó Laighléis*) as "a case which followed *In re Ó Laighléis* [1960] IR 93" is perhaps an oversimplification.

[100] *Ibid.* Kearns J. referred to *Ó Laighléis*, a "case is of particular importance having regard to the clarity of the obligations contained in the Convention, in contrast with the often somewhat "woolly" principles of customary international law". However, according to Kearns J., the principle was "the same when it comes to considering the role of international law in Irish domestic law" and the judgment of Maguire C.J., which was set out *in extenso*, "encapsulates an authoritative statement of the law in this country which has been followed ever since". Then, having cited this passage from *Ó Laighléis*, much of it dealing exclusively with the position of Article 29.6 and concluding to the effect that an argument based on estoppel might operate as between the parties to the Convention but could not operate in a domestic court applying domestic law, Kearns J. stated (at 507) that this final sentence provided "an insight into how customary international law may operate in domestic law". Thus, the regime for implementation of international agreements and that for implementation of custom appear to be conflated.

[101] [2003] 2 IR 468, at 507. The Court cited the *Government of Canada* and *McElhinney* cases as examples of cases where the rules of customary international law may create rights and duties between states, which may be invoked, as in this cases, by a foreign state "to protect its position in this State".

[102] Kearns J. referred to the dictum of Fennelly J. in *Kavanagh* to the effect that the Constitution "establishes an unmistakeable distinction between domestic and international law".

law is inconsistent with the principle in question". Where a conflict arose, "the rule of international law must in every case yield to domestic law".[103]

The Court then proceeded to consider the effect of Article 29.3, in particular whether it could confer rights on individuals and, if so, whether its provisions bound the Government to act in accordance with "the generally recognised principles of international law once identified". In relation to the first limb, the Court expressed the view that "[t]he overwhelming line of judicial authority ... is to the effect that no individual rights arise under Article 29 of the Constitution"[104] and referred to the decision in *Kavanagh* as being determinative of the matter.[105] Notwithstanding this finding, the Court went on to consider the second limb i.e. whether the provisions of Articles 29.1 to 29.3 created "binding obligations on the State whereby it must act in accordance with generally recognised principles of international law if and when same are identified".[106] After referring to Articles 5, 6, 15, 28 and 29 of the Constitution, the Court considered the judgment of Walsh J. in *Crotty v. An Taoiseach* dealing with the scope of the executive power under the Constitution[107] and queried whether, if the executive power conferred by the constitution could only be depleted or removed by referendum, it could ever be said that the wide discretion in foreign policy and international relations could be curtailed "by the operation of some general principle of customary law". [108] In Kearns J.'s view, the answer could "only be in the negative"[109] and he identified a number of implications of any contrary finding which fortified that view.[110] On this basis, the Court agreed with the

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[103] [2003] 2 IR 468, at 508.
[104] *Ibid.*
[105] *Ibid.:* On this basis, the Court found in favour of the defendants "on the issue of justiciability in respect of all arguments sought to be advanced by the plaintiff under Article 29 of the Constitution".
[106] [2003] 2 IR 468, at 509.
[107] [2003] 2 IR 468, at 509-512.
[108] [2003] 2 IR 468, at 512.
[109] *Ibid.*
[110] *Ibid.* These implications were: "(a) the conduct of international relations, normally characterised by discretion, flexibility and the ability to adapt to changing circumstances, would now be constrained by constitutional rules, the content of which would be impossible to determine without a court ruling;
(b) the generally recognised principles of international law themselves are not defined by the Constitution, are not discernible by any process of interpretation of it and are liable to disputes;
(c) although the conduct of international relations sometimes requires urgent action, there could be no certainty that any step would be consistent with the Constitution without prior declarations from the courts;
(d) while it is acknowledged that the generally recognised principles of international law may change if the practice of states changes, Ireland alone would be freeze-bound by the pre-existing principles. It could not itself be a participant in any such change. Ireland would thus have to conform to a norm established by the practice of other states, but could not become one of the states whose conduct could change such a norm;
(e) interpretation of the constitutional principles as argued for by the plaintiff would clearly permit a challenge to a war declared by the executive even with the approval of the Dáil under Article 29.3, on the grounds that it was a war that did not comply with justice and morality, or the principle of pacific

defendants' submission that the provisions of Articles 29.1 to 29.3 were "to be seen therefore as statements of principle or guidelines rather than binding rules on the executive".[111] According to Kearns J., while the Constitution had precise legal provisions, it also had "less precise provisions, such as those relating to fundamental freedoms" and "aspirational or declaratory provisions which cannot be made the subject matter of binding legal norms", such as Article 29.1 to 29.3.[112] As a result, the Court rejected the applicant's claim based on Article 29.

In the Court's conclusion on the argument based on customary international law, the confusion of legal bases becomes apparent:

> I have concluded therefore on this aspect of the case, that international law is only admissible in domestic law to the extent already indicated where in certain limited situations it may be availed of to determine private law claims, absent some contrary or conflicting provision of either the Constitution, statute law or common law. It may also avail other states in their dealings with this State on the international plane. It cannot, however, impose binding public law obligations on the executive towards its own citizens under Article 29 for all the reasons stated.[113]

Thus, the effect and status of a rule of customary international law within Irish law appeared to depend not only on the party invoking it (whether it was an individual or a State) but also the party against whom it was being invoked and the nature of the claim being advanced (whether it was a "private law" claim or a "public law" claim). Depending on the party invoking it and the nature of the claim being advanced, the legal basis of the rule might be the common law or Article 29.3. Admittedly, in coming to these conclusions, the High Court was merely drawing out the implications of the existing case-law. However, the conclusions only serve to emphasise the incoherence of that case-law. The Court, having accepted rather summarily a very contested, broad-based and far-reaching rule of customary international law, retreated from its potential implications. While the ultimate conclusion – that the plaintiff should not be allowed to rely on the rule as a matter of

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settlement of disputes, under Articles 29.1 and 29.2." Some of these statements misunderstand the nature of customary international law not to mention methods of constitutional interpretation, particularly the notion that the State could be freeze-bound by pre-existing custom where that custom has in fact changed and could not be a participant in such change and the emphasis on a requirement for a court ruling before an organ of State can act on foot of a rule of customary international law.

[111] [2003] 2 IR 468, at 512-513 (approving the views of Henchy J. in *Sumers Jennings*).

[112] [2003] 2 IR 468, at 513.

[113] *Ibid.* The reference to private law claims appears to be to the *ACT Shipping* case. While the claim was indeed one of private law, significantly the claim was against public bodies i.e. the Minister for the Marine.

Irish law – might well be justified on other grounds,[114] the reasoning upon which it was based is problematic.

The content and legal character of customary international law does not vary depending on whether it enters Irish law as part of the "law of nations" under the old common law formula or as part of "the generally recognised principles of international law" under Article 29.3. Although its status, effect and invocability within Irish law may very well differ for this reason, that is a separate issue.[115] Yet the case-law which has been examined appears to suggest, as Symmons has described it, that custom forms part of Irish law, "partly by dint of the Constitution and partly (and perhaps more importantly) because of the Irish courts' continuation of the UK common law doctrine of 'incorporation'".[116] Although this accurately reflects the inconsistencies of the jurisprudence, it is not a coherent or principled legal basis for the implementation of custom within the Irish legal system.

The approach of the Irish courts to Article 29.3 has been neither cogent nor compelling. On the one hand, the provision – which, in contrast to Article 29.1 and Article 29.2 accepts, a long-established if unstable set of legal rules which bind all members of the international community[117] - has been written off as a mere "guide" and "aspiration".[118] On the other hand, an overly literalist parsing of the text of Article 29.3 has been employed to exclude its applicability in cases where Irish law is challenged by an Irish individual,[119] but to rescusitate its dormant legal character in circumstances where another State is involved.[120] Ultimately the problem lies in

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[114] *Infra* section III.F.

[115] *Infra* section III.F.

[116] Symmons, note 40 (Eisemann), at 350.

[117] It is only in the context of Article 29.3, when they potentially pose a challenge to rules of domestic law, that the legal character of those rules is thrown into doubt. In the context of the common law, they are accepted subject to their lowly hierarchical rank which poses no threat to any contrary provisions of Irish law. As a clear acceptance of a definite, independent source of law, Article 29.3 is a far more concrete undertaking than the statements of adherence - to the ideal of peace and friendly cooperation and to the principle of pacific settlement of international disputes - found in sections 1 and 2 respectively. As Symmons noted, note 27 (1973), at 50: "...even if Article 29.3 does not directly impinge on the domestic level, this does not mean that it has no effect, as a restrictive guide to policy, on the *international* level."

[118] One is struck by the analogy that might be drawn with the provisions on fundamental rights in Articles 40 to 44 of the Constitution, which were generally taken to consist of 'headlines for the Oireachtas': see e.g. Kelly, *Fundamental Rights in the Irish Constitution* (Allen & Unwin, 1961).

[119] Symmons has referred to the "forced literal interpretations" of the phrases within Article 29.3: Symmons, note 40 (Constitution Review Group), at 581. This is particularly evident in the argument before the Supreme Court cited in the report of the *Kavanagh* case e.g. the question by Hardiman J. about the meaning of "idirnáisiúnta" as "*between* nations": [2002] 3 IR 97, at 115.

[120] This is the case in *Burke*, *McElhinney* and *Schmidt*. In this context, if one were to follow through with a strict interpretation of Article 29.3 confining it to State litigants only, one might question what is the position in relation to the standing of international organizations to invoke customary international law in an Irish court. More generally, the argument that a State may rely on another State's constitution seems misguided.

Article 29.3 itself. It is not clear whether, and, if so, to what extent, it was intended to have legal effect within the Irish legal system.[121] However, it is incumbent on the courts, in interpreting the Constitution, to adopt a consistent and coherent approach to its meaning. If Article 29.3 cannot confer rights on Irish individuals bound by the Irish Constitution, how can it be regarded as conferring rights on other sovereign States and how can this be reconciled with other provisions of the Constitution?[122] If it is non-justiciable and imprecise on foot of an individual's claim, how does it, automatically and without examination of the nature of the specific rule, become justiciable and precise at the behest of another State? Moreover, how is all this to be squared with the dicta to the effect that it is merely a guide to the State in its relations with other States?[123] What justifies the distinction between rules of customary international law conferring rights or imposing obligations on States and those, such as certain rules of international human rights, humanitarian or criminal law, which confer rights or impose obligations on individuals? Other States may well have rights under customary international law which are enforceable against Ireland as a matter of international law; the extent to which they may be enforced in Irish courts is a question of Irish law but it is one on which the bald acceptance of international law in Article 29.3 offers little guidance. In essence, issues which are appropriately considered in determining the internal effects and applicability of customary international law have been confused with those concerning the more fundamental issues of its legal basis.

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[121] Symmons has referred to "the judicial habit of reading more into this section of Article 29 than was intended by the framers of the Constitution": Symmons, note 40, at 580. While recognizing that this is not a necessary implication of Article 29.3 and highlighting potential problems in respect of Article 29.4, Phelan has remarked that "ranking principles recognised by the Constitution as below the status of statutes would be an unusual interpretation of the Constitution": Phelan, *Revolt or Revolution? The Constitutional Boundaries of the European Community* (Round Hall Sweet & Maxwell, 1997), at 323 *et seq*.

[122] The notion that foreign States as a matter of Irish constitutional law have a superior status as litigants within the Irish legal system is misguided. The relationship between States is governed by international law. It is a general principle of international law that "a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law" (*Treatment of Polish Nationals* (1932) 46 PCIJ Series A/B 4, at 24). Conversely, a State cannot seek to rely on another State's constitution with a view to enforcing against it obligations under international law. Even if this was correct, it is problematic in its implications (e.g. to what extent would individuals be precluded from making counter-arguments based on international law? To what extent does it apply to other international legal persons such as international organizations?) and undesirable in principle (particularly having regard to the fundamental rights of citizens under Articles 40-44 of the Constitution).

[123] This is an example of the overreliance on textual exegesis in respect of a provision expressed in terms of broad principle. However, the basic reason that this position is unsustainable is that it treats customary international law, not as a common body of rules, which falls to be applied or not according to its applicability to a particular set of circumstances, but as a body of law of varying legal bases.

Looking at the case-law as a whole, it must be concluded that Article 29.3 does not have a direct role in the implementation of customary international law, as part of the "generally recognised principles of international law", in the Irish legal system. In the first instance, those cases which reject any such role for Article 29.3 do so categorically. Moreover, those cases which may be regarded as implicitly supporting such a role for Article 29.3 (for example, the sovereign immunity cases) do not fully address the issue and its implications, are often equivocal in their own terms, and in any event can be understood, if somewhat awkwardly, as consistent with the common law approach.[124] This is not to say that Article 29.3 could not have been interpreted in such a way as to serve as the legal basis for custom within the Irish legal system even though it does not expressly address the question of its internal effect.[125] However, on the whole, the case-law rejects such a position.

In light of these considerations, it appears to be the case that customary international law, insofar as it forms part of Irish law, does so by reason of the carryover of the common law rule that customary international law forms part of the law of the land, subject to its consistency with domestic law. It has been observed that "because they are unwritten, customary rules are inevitably molded into the legal reasoning and language peculiar to the domestic legal order in question".[126] In light of the similarities between the common law and custom – unwritten sources of law capable of change over time – this observation certainly holds true in the Irish legal system. The implications of this conclusion will be explored in the following sections.

Before doing so, however, it is necessary to consider whether Article 29.3 has any residual role in the implementation of custom in the Irish legal system. Symmons has described it variously as a "declaratory re-statement of the classical common law doctrine of incorporation", a "superfluous statement of the obvious" and a "constitutional paper tiger". De Visscher, in his mid-20th century survey of constitutional provisions relating to international law, considered it in similar (or

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[124] This is particularly so in respect of the *Government of Canada* and *McElhinney* cases.

[125] Taking a purposive interpretation of the provision, like that taken by the ECJ in relation to international agreements in the *Haegeman* case or in relation to custom in *Racke*, one could consider the internal effect of custom through Article 29.3 as being implicit in, or a corollary of, that statement of acceptance of international law, the proviso "as its rule of conduct in its relations with other States" serving as a description of international law but not necessarily limiting its application to inter-state relations.

[126] Stirling-Zanda, "The determination of customary international law in European courts" (2004) 4 *Non-State Actors & International Law* 3, at 10.

even more severe) terms.[127] There is certainly some irony in the conclusion that the legal basis for custom in the Irish legal system is the common law and not Article 29.3 of the 1937 Constitution, which asserted the State's independence in international relations at a time when this had not yet been put beyond doubt. At the same time, notwithstanding the great changes which the Constitution embodied, it also ensured a high degree of continuity not only in the institutional framework of government but also in the wider legal system, through Article 50, like Article 73 of the 1922 Constitution before it. If the common law rule that customary international law formed part of the law of the land was carried over subject to its consistency with the 1937 Constitution, Article 29.3 at the very least provides constitutional cover for this carryover. Beyond that, even if it is not directly enforceable in the courts, the provision may also be considered to serve as an important reminder to the organs of government, judicial, executive and legislative, of the importance and binding character of international law. Finally, as discussed earlier, Article 29.3 may be considered as giving the stamp of popular approval to a source of law which would not otherwise comfortably fit within the democratic system of government established by the Constitution.

C. Mode of Implementation

Notwithstanding the confusion which has surrounded the question of its legal basis, it is clear that customary international law may form part of Irish law through the common law. This section seeks to analyse the mode, or mechanics, of implementation. Does custom automatically form part of Irish law or is some positive legal act required for its recognition, as is the case with international agreements under Article 29.6 of the 1937 Constitution? This has been one of the major debates relating to the position of custom across common law systems, also influencing whether the approach to implementation of custom is classified as monist

[127] Having referred to Article 29.3, de Visscher commented that such provisions "offer hardly any interest"; "they do not establish the principle of conformity of the internal legal order with the international legal order and therefore do not authorize by themselves the internal judge to apply international law in the disputes which come before him..."; "it is superfluous in order to allow the Parliament to reproach the Government for a violation of international law": de Visscher, note 47, at 518-519 (author's translation). Later, in his study, de Visscher describes such constitutional provisions as "at once useless and dangerous", useless because they enunciate an obvious rule which finds its foundation in the international legal order and dangerous because their inclusion within the internal constitution is liable to create doubt as to the foundation of that rule and as to the extent of the obligation that it entails: note 47, at 520 (author's translation).

or dualist.[128] Although this question is also not entirely free from confusion, the weight of Irish authority suggests that no positive legal act is necessarily required for custom to form part of Irish law.

In cases such as *de las Morenas* and *Government of Canada*, leaving to the side the question of legal basis which has already been discussed, the Supreme Court clearly considered the relevant rules of custom to form part of Irish law automatically and without any implementing action, whether in the form of legislation or judicial decision.[129] Putting the matter more bluntly, while those cases refer to precedent in their consideration of the relevant rules of international law, they do not in any way rely on those authorities as being the source of those rules or as being the mode through which they form part of Irish law. Moreover, in many cases, there may very well be no precedent in point and it would be wholly artificial to claim that a positive domestic act of reception (particularly if it is the judgment itself) is required for such a rule to be regarded as forming part of Irish law. In reality, this issue demonstrates how little there can sometimes be, at least on a practical level, between the monist and dualist labels.

In *Ó Laighléis*, Maguire C.J. spoke of the pre-existing common law, under which the "principles ...commonly accepted as binding by civilised nations became part of the domestic law unless they could be shown to be contrary to it", as "the principle of incorporation".[130] The position of Davitt P. was more equivocal, perhaps reflecting the wider debate in the common law between the doctrine of incorporation, and the doctrine of transformation: he stated that the rules of international law were not part of domestic law "except in so far as they have been made so by legislation, judicial decision, or established usage",[131] which implies some act of domestic reception, although its character (for example, in the case of judicial decisions and established usage) may be declaratory rather than constitutive; the statement - "to that extent its rules may be applied by the Courts so long as they are not in conflict

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[128] As discussed in Chapter 1, even in apparently monist systems, the legal basis for the rule of international law can be traced to a rule of domestic law: for example, the real basis for custom would still be the common law rule that it is part of law of the land and thus a dualist position.

[129] Hederman J. approved the statement of O'Byrne J. in *de las Morenas*: [1992] 2 IR 484, at 490. Note also the language of the Report of the Law Enforcement Commission, which speaks of the generally recognised principles of international law being "carried into Irish law to the extent set out in the provisions of Article 29.3": *Report*, note 69, at 22.

[130] [1960] 1 IR 93, at 102.

[131] [1960] 1 IR 93, at 103.

with an enactment of the Legislature or a rule of common law" – may be seen as putting a different, incorporationist slant on the question.[132]

In *ACT Shipping (PTE) Ltd. v. Minister for the Marine*,[133] Barr J. invoked this dictum of Davitt P. as the basis for his conclusion as to the general position of Irish law which was that "established principles of customary international law may be part of Irish municipal law provided that they are not contrary to the provisions of the Constitution, statute law or the common law",[134] what he described as the process of "the absorption of international customary law into Irish domestic law".[135] In *Horgan*, Kearns J. in turn relied on this statement of Barr J. and the decision of Maguire C.J. in *Ó Laighléis* as the basis for his conclusion that "principles of international law enter domestic law only to the extent that no constitutional, statutory or judge-made law is inconsistent with the principle in question".[136]

In these cases, the High Court placed a clear incorporationist gloss on the ambiguous dicta from *Ó Laighléis*. Davitt P.'s proviso that international law was not part of Irish law "except in so far as they have been made so by legislation, judicial decision, or established usage" ceded way to his more positive statement that "... its rules may be applied by the Courts so long as they are not in conflict with an enactment of the Legislature or a rule of common law". This position has also found support outside the courts[137] and is in line with the approaches taken in other jurisdictions,[138] including in the United Kingdom where the artificiality of the clash between incorporation and transformation has long been recognised[139] and the

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[132] *Ibid.*

[133] *ACT Shipping (PTE) Ltd. v. Minister for the Marine* [1995] 3 IR 406. For an analysis of this case, see Gaffney, "The Status of International Customary Law in Irish Domestic Law: A Review of the 'Toledo' Case" (1996) 14 *ILT* 192.

[134] [1995] 3 IR 406, at 422-423.

[135] [1995] 3 IR 406, at 421: "The plaintiff is not seeking redress against the State in international law, but in domestic law on the premise that the prima facie right of a foreign ship to the benefit of a port or anchorage of refuge in an adjacent state has in time evolved into Irish domestic law from customary international law".

[136] [2003] 2 IR 468, at 508.

[137] See Casey, *Constitutional Law in Ireland* (3rd ed, Round Hall Sweet & Maxwell, 2000), at 190 (describing Article 29.3 as "more than an aspiration" and as creating a "conduit through which customary international law flows into Irish domestic law"). According to the Report of the Constitution Review Group, an analysis of the case-law suggested that "there is a trend towards giving effect in internal domestic law to the generally recognised principles of international law" although "the parameters of this emerging doctrine are not yet clear": see Report, note 39, Article 29.3.

[138] See Cassese, note 4, at 224: "Although there is very great diversity in the ways of implementing customary rules, nevertheless a common feature stands out. All national systems adopt the same basic modality of implementation: automatic standing incorporation". See also Wildhaber and Breitenmoser, note 36. A caveat must be added in respect of the position in Denmark: see Harloff, "Denmark - Danemark" in Eisemann ed, note 25, at 173.

[139] Crawford and Edeson have observed that the dicta in the cases supporting the incorporation and transformation doctrines are ambiguous and may be better as explained as a concern about the identification of, and consent to, the rules of customary international law rather than about the mode

doctrine of incorporation is generally regarding as prevailing even if some doubts still persist.[140] Some aspects of the debate between the doctrine of transformation and that of incorporation mirror wider debates about the nature of the common law itself.[141] Furthermore, in common law systems wedded to the doctrine of precedent, a doctrine of transformation could give rise to considerable difficulty in the case of a change in the content of the rules of customary international law.[142] As Butler has put it, "nothing whatever seems to be gained by interposing the amorphous procedural requirements implied by transformation and the problem of change in the law – exceptionally controversial for international lawyers in any event –can be more directly and responsibly confronted by a court when it considers the appropriateness of applying the rule of international law and the precise substance of the rule at the given point in time without being bound by its own perhaps untimely precedents".[143]

Thus, in contrast to the position of international agreements under Article 29.6, it appears that customary international law is recognised as automatically forming part of Irish law, what might be classified as a monist approach. However, as the next section shows, the application of customary international law is subject to other limitations.

D. Status of Customary International Law

The real import of the legal basis of custom in Irish law is its effect on the status or hierarchical rank of custom within the Irish legal system. If the courts had considered

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of implementation per se: see Crawford and Edeson, "International Law and Australian Law", in Ryan ed, *International Law in Australia* (2nd ed, Law Book Co, 1984).

[140] See above note 42.

[141] On the declaratory and opposing theories of the common law, see e.g. Glenn, *On Common Laws* (Oxford University Press, 2005); Thomas, *The Judicial Process* (Cambridge University Press, 2005).

[142] See the well-known statement of Lord Denning M.R. in *Trendtex Trading Corpn v. Central Bank of Nigeria* [1977] WLR 356, at 365-366: "Seeing that the rules of international law have changed - and do change - and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law. It follows, too, that a decision of this court - as to what was the ruling of international law 50 or 60 years ago - is not binding on this court today. International law knows no rule of *stare decisis*. If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change - and apply the change in our English law - without waiting for the House of Lords to do it". For a critique of the notion of precedent underlying this decision, see Beaulac, "Customary International Law in Domestic Courts: Imbroglio, Lord Denning, Stare Decisis" in Waters ed, *British and Canadian Perspectives on International Law* (Martinus Nijhoff, 2006) at 379.

[143] Butler, "International and Municipal Law: Some reflections on British Practice" in Butler ed, *International Law and the International System* (Martinus Nijhoff, 1987), at 67.

custom to take effect through Article 29.3,[144] its principles would enjoy constitutional status and prevail over inconsistent legislation or common law.[145] Although this would ensure the optimal status for custom and would reduce the possibility of conflict between Irish law and customary international law, it could pose considerable difficulty in practice.[146]

However, as we have seen, the Irish courts have rejected a constitutional basis, and with it a constitutional status, for custom. In accordance with the common law rule, custom is part of Irish law only insofar as it is not inconsistent with the Constitution, with legislation (which includes Irish legislation both pre-dating and post-dating the Constitution as well as legislation giving effect to the State's obligations under the European Treaties and other international agreements) and, finally, the common law itself.[147] As expressed in sweeping terms by Kearns J. in *Horgan*, "the rule of international law must in every case yield to domestic law".[148] Thus, while it is recognised as part of the law, it is inferior in status to other parts of the law. In other words, in light of the discussion on custom's legal basis in the Irish legal system, its place within Irish law has been secured but at the expense of its hierarchical status within that system.

In light of the legal basis of custom in the common law, its inferior status vis-à-vis the Constitution and legislation follow as a matter of course. However, its status vis-à-vis other rules of the common law is more problematic. Does the fact that a common law rule is a rule of customary international law automatically render it inferior to any other rule of the common law? If it does, should this be the case? In working out the interaction between such rules, the courts may be required to adopt a more nuanced approach than that which Kearns J.'s dictum in *Horgan* appears to imply.

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[144] Casey noted that it was "still unclear whether the generally recognised principles of international law are imported into the legal system at the constitutional – or a lower – level": Casey, note 137, at 193.

[145] This is the basis of the argument of the Irish members in the Law Enforcement Commission.

[146] Although this may be a desirable position in principle, it may present difficulties in practice due to different legal systems' accommodation of legal change. From the perspective of common law systems, while the courts have recognized that the doctrine of precedent in the strict sense does not apply to customary international law, there is nonetheless difficulty in determining whether and when a change in a rule of customary international law has occurred and consequential difficulties of legal certainty e.g. where the judicial and political organs take different views of the status of a rule of customary international law. From the perspective of international law, moreover, the interaction between custom and treaty is complex.

[147] *ACT Shipping (PTE) Ltd. v. Minister for the Marine* [1995] 3 IR 406; *Horgan v. An Taoiseach* [2003] 2 IR 468.

[148] [2003] 2 IR 468, at 508.

At the same time, it must be recognised that, in practice, the scope for conflict between the rules of customary international law and those of Irish law may be quite limited in practice.[149] While there may increasingly be overlap in subject-matter between treaty and custom, and between international law and domestic law more generally, in many cases, the difference of subject-matter of itself reduces the potential for conflicts between custom and other parts of Irish law. Moreover, in line with the principle described in Chapter 3 in the context of, but not limited to, international agreements,[150] the Irish courts will interpret Irish law in a manner consistent with its international obligations insofar as it is possible to do so. In this way, the courts assist in reducing the scope for conflict between Irish law and customary international law.

E. Identification of Customary International Law

If uncertainty has been a defining feature of the Irish legal system's approach to custom, it reflects uncertainty in the source itself.[151] Identifying a rule of customary international law and of its scope can be a very difficult task.[152] This is true for international tribunals which frequently undertake this task.[153] It is even more difficult for national courts, for which the identification of such rules arises infrequently, involves an unfamiliar methodology and relies on the evidence and submissions of parties which will generally not have access to the same breadth of material as those appearing before international tribunals.[154] Having regard to these

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[149] As Casey remarks, "the likelihood of any such conflict is remote" and may be rendered even more remote "if the Irish courts adopt a presumption that legislation is not intended to contravene international law". Casey, note 137, at 195.

[150] See Chapter 3, Section III.C.ii.b.

[151] *Supra* Section II.

[152] As well as in establishing the existence or not of the rule, there is "a closely related methodological problem: that of determining what is the scope, the precise ambit, of a rule that is inferred from State practice": Lowe, note 4, at 49. The case of *ACT Shipping* is an example of this problem in practice.

[153] Boyle and Chinkin, note 15, at 278-285.

[154] As Shearer observes, "National courts are not in a good position to decide disputed questions of customary international law, which would involve weighing up state practice and assessing the exhibition of the necessary *opinio juris"* : Shearer, "The Implications of Non-Treaty Law Making: Customary Law and its Implications" in Alston and Chaim, *Treaty-making and Sovereignty* (Federation Press, 1995), at 93. Crawford and Edeson echo this concern: "There are obvious difficulties in "translating" international law, primarily a law between states, to municipal forums where the litigants are (in almost all cases) not states. Many international law rules are addressed to the executive government of the state, rather than to its courts. Those that are, or might be construed as, addressed to courts are very often rules establishing minimum standards rather than self-executing rules" (Crawford and Edeson, note 139, at 72-73). However, as Aust notes, "most customary international law continues to be developed by domestic courts", which was "still a good way" because "domestic courts decide what international law is after legal argument based on real situations and facts: the very way in which the common law developed and continues to do so". See Aust,

difficulties, it is perhaps no surprise that courts have occasionally questioned their ability to identify rules of customary international law.[155]

Nevertheless, customary international law is part of the law to be applied by the courts and "[in] principle a court is presumed to know the law and may apply a custom even if it has not been expressly pleaded".[156] In contrast to foreign law in the context of private international law, it does not require formal proof by expert evidence.[157] However, because it is distinct from other sources of Irish law, the identification of customary international law has certain unusual features. First, while ultimately a question of law, there is a factual and a legal component to the identification of custom: the practice of States which underlies a rule of customary international law is a question of fact and may be the subject of evidence (albeit fact and evidence of a very different character to that normally adduced in a trial with a view to determining the issues between the parties);[158] the legal characterisation of such practice is, however, properly a matter for legal submission.[159] Secondly, although the identification of customary international law is primarily a matter for

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"Domestic Consequences of Non-Treaty (Non-Conventional) Law-Making" in Wolfrum and Röben eds, *Developments of International Law in Treaty Making* (Springer, 2005), at 495-496.

[155] The most obvious example is *Horgan*. While at the outset of his judgment, Kearns J. acknowledged the Court's ability and willingness to ascertain the content of customary international law: "Nothing in the submissions of the defendants suggests that this court is inhibited or precluded from, firstly, identifying a general principle of international law and then, secondly, considering if and how it may operate in domestic law. Indeed, the courts in Ireland have been faced with and have discharged precisely such a task and function in cases such as *ACT Shipping (PTE) Limited ...*, *Government of Canada ...*and *McElhinney...*": [2003] 2 IR 468, at 503. He went on to make a finding with respect to the principle of international law relied upon by the plaintiff. However, later in the context of his consideration of Article 29.3, Kearns J. expressed concerns about "the generally recognised principles of international law" which were not "defined by the Constitution and are not discernible by any process of interpretation of it and are liable to disputes" Furthermore, if Article 29.3 were interpreted as a limit on the executive power in external relations, the conduct of international relations would now be constrained by constitutional rules, "the content of which would be impossible to determine without a court ruling".

[156] Brownlie, note 4, at 41.

[157] "There is not a legal system in the world where international law is regarded as 'foreign law'. It is everywhere part of the law of the land...": Higgins, "Dualism in the Face of a Changing Legal Culture" in Mads Andenas ed, *Judicial Review in International Perspective* (Kluwer, 2000), at 9. However, the exact boundaries between expert and normal proof may sometimes be blurred. It is a matter for legal submission rather than evidence but, because of its nature and the difficulties of proof to which it gives rise, courts are particularly dependent on the submissions of the parties in this context. Thus, notwithstanding the basic principle of judicial notice, the reality is that the party pleading a rule of general international law will bear the burden of establishing the existence of a principle of general international law.

[158] Mendelson, "The effect of customary international law on domestic law: an overview" (2004) 4 *Non-State Actors & International Law* 75, at 78-79.

[159] *Ibid.* Note also the comments of Lloyd-Jones that "the procedure of the English courts, which remains essentially an oral procedure, does not easily lend itself to the presentation of international legal materials"; Lloyd-Jones "The role of lawyers in "establishing" customary international law in the Pinochet case" (2004) 4 *Non-State Actors & International Law* 49, at 56. See also Boyle, "International law before national courts: some problems from a common law perspective" (2004) 4 *Non-State Actors & International Law* 59, at 62-63.

the courts, there are certain questions of international law – for example, whether Ireland recognises another State or a particular international legal situation – in respect of which the courts have traditionally sought the opinion of the Government so as to avoid impinging upon its exercise of the executive power in external relations.[160] Although this procedure was employed in the *McEvoy* case,[161] there is no modern Irish practice on this issue. Thirdly, as Higgins has observed, "one of the special characteristics of international law is that violations of law can lead to the formation of new law".[162] Thus, identifying custom where its rules are in the process of changing – in particular, determining whether to characterise practice as a violation of the rule or as evidence of a new rule – poses considerable challenge.[163]

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[160] Denza describes this jurisdiction as relating to "questions of fact.... peculiarly in the knowledge of the government": Denza, "The Relationship between International and National Law" in Evans ed, *International Law* (Oxford University Press, 2003) at 442. For example, where a question arises as to the recognition of a foreign state or government, it may be appropriate for the court to request the opinion of the Government (more specifically, the relevant member of the Government e.g. the Minister for Foreign Affairs) on the issue. Traditionally this has taken the form of an executive certificate.

[161] In *McEvoy v. Owners of S.S. Otto* [1942] 1 IR 148, the plaintiffs sought declarations that they were trustees for the lawful owners of a number of commercial ships registered in Estonia and Latvia, which were in Irish ports, and of which, following the Russian invasion of Estonia and Latvia and its decree nationalising private property, the USSR claimed ownership on the basis of 'certificates of delivery' issued to the ships' masters. The USSR sought to set aside the proceedings on the basis of its sovereign immunity. In answer to a question of Hanna J., the Minister of Foreign Affairs stated that Ireland did not officially recognise the USSR government as the government of Estonia and Latvia. As a result, Hanna J. dismissed the USSR's motion to set aside the proceedings. Upon appeal to the Supreme Court and after the Department confirmed it recognised the USSR as government neither *de jure* nor *de facto*, that Court held that the USSR was not in any way affected by the proceedings and then affirmed the order of Hanna J. In adopting this course of action, the Irish courts followed the practice of the United Kingdom.

[162] Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1994), at 19.

[163] Where there is conflicting practice or *opinio juris*, this may suggest a number of things: first, it could simply demonstrate that there is no near-universally recognised rule of general international law; secondly, it could be evidence on the part of an individual State which, if sufficiently clear and consistent, might be regarded as persistent objection so as to exempt that State from the particular rule concerned; thirdly, if amongst a group of states, it might evince a regional or local custom deviating from a generally recognised custom; fourthly, it could be evidence of the changing content of the rule of international law, as the old rule adapts into a new rule. As noted at the outset, customary international law is not a static source of international law. Even where a rule has been definitively established to exist by the highest tribunals, nationally and internationally, it may be subject to change in accordance with the practice of States. Thus, in the consideration of customary international law, domestic courts – which, in common law systems, such as Ireland, abide by the general, albeit not absolute, doctrine of precedent and the principle of *stare decisis* – may be required to treat prior decisions, even of their own Courts, with a certain liberality and flexibility: see *Trendtex Trading Corpn v. Central Bank of Nigeria* [1977] WLR 356, at 365-366 (quoted at note 145). In an Irish context, this principle finds recognition in the comments of the Irish members of the Law Enforcement Commission who noted, with respect to Article 29.3, "the effect of [Article 29.3] is that at the time when any given intervention is called for the state of international law at that particular time is what is to be looked at. The Constitution does not purport to determine what are the general principles of international law but carries in those which are so generally recognised.... It does not purport to carry them in as they were at any fixed time but the test should be what they are at the time the court is called upon to intervene..... consequently the impact upon domestic law of this provision of the Constitution would vary with what are currently recognised as the general principles of international law": Report, note 69, at 23. While the Commission members considered the issue from

Nevertheless, the courts must confront these challenges when issues of customary international law are raised in litigation. The starting point for the identification of customary international law is to be found in the basic criteria laid down in international law: a general, near-uniform practice evidencing the rule, supported by the necessary *opinio juris*. First, while the standard required is described in various ways, it is clear that there must be evidence of a general, widespread and near-uniform practice.[164] Secondly, in respect of the *opinio juris*, this is often extremely difficult to show independently of the conduct or practice of the State itself and most often the material provided as evidence of practice will be taken to imply the State's conviction of being legally bound. In addition, such a rule, just like other rules of law, must be capable of being established and defined with reasonable precision.[165]

In identifying these elements of custom, the possible material sources of this practice and *opinio juris* are diverse and open-ended.[166] They may be official or unofficial in nature, private or publicly available, domestic or international. Their value will vary accordingly.

Although it is generally the executive organ of government which represents the State on the international stage, and accordingly its practice which of primary interest, the practice of the legislative and judicial organs, as well as subsidiary bodies in fields of a specialised or technical in nature, may also be relevant.[167] Increasingly, this practice takes place in a multilateral, institutional context, whether at the regional or international level. Moreover, for Member States of the EU, in areas over which the EU has exclusive or shared competence, the practice of the EU may bind Member States.[168]

In practical terms, in identifying customary international law in internal legal systems, the parties and the courts will often rely heavily on the "subsidiary means of determination" of the rules of law set out in Article 38(1)(d) of the Statute of the

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the perspective of Article 29.3, this characteristic applies equally if general international law is regarded as forming part of Irish law through the common law.

[164] Although some authorities speak in the language of universality – e.g. *The Parlement Belge* LR 5 PD 197, cited in the *McEvoy* case ("all nations have agreed that it shall be so") – international law does not require such universal acceptance.

[165] "If a recognised principle exists forbidding the extradition of political refugees it should be possible to state it in terms sufficiently definite to be applied by a Court of law": *The State (Duggan) v. Tapley* [1952] IR 62, at 77 (per Maguire CJ).

[166] Lowe, note 4, speaks of "anything that can be written on paper".

[167] For example, in *The State (Duggan) v. Tapley* [1952] IR 62, the Supreme Court made extensive refernece ot the legislation in a range of States (Belgium, the Netherlands, the United States of America, Germany, Sweden, Switzerland, Britain).

[168] See Lowe, note 14.

International Court of Justice: namely, "judicial decisions and the teachings of the most highly qualified publicists of the various nations". Both have been relied upon heavily in the Irish courts in their consideration of issues of customary international law.

In the Irish courts, the decisions of national courts have received particular attention[169] but the courts have on occasions been referred to the jurisprudence of international tribunals, most notably the European Court of Human Rights.[170] There has also been widespread reference to and reliance on legal scholarship in identifying rules of customary international law.[171]

The other sources of international law increasingly provide evidence of customary international law. International agreements, particularly those are the outcome of a multilateral codification process, may shed light on customary international law although caution must be exercised in assessing the customary character of particular provisions of such agreements.[172] Similarly, it has become increasingly common to refer to other sources or quasi-sources of international law, for example resolutions of the UN General Assembly, in identifying rules of customary international law.[173] This again requires caution. The fundamental

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[169] See e.g. *McEvoy v. Owners of S.S. Otto* [1942] IR 148; *Saorstát and Continental SS. Co. v. de las Morenas* [1945] IR 291; *Government of Canada v. Employment Appeals Tribunal* [1992] 2 IR 484; *McElhinney v. Williams* [1995] 3 IR 382 (referring to authorities from the United Kingdom, the United States and Germany). Note the comments of Hanna J. in *McEvoy* [1942] IR 148, at 161: "In the Courts of Eire, we are not bound by any decision of the British Courts since 1922. We must consider the trend of public international law generally with reference to any particular topic, while giving due weight to any views expressed in Great Britain or in the United States or in any other important country". It is to be hoped that, with the much easier accessibility of such decisions (whether through the International Legal Materials, International Law Reports, and online through the International Law in Domestic Courts database), reference to such sources will in future be more common. Although heavy reliance on the United Kingdom approach may be understandable, it has arguably been too extensive, to the point that the courts on occasion appear to assume that the basis and approach to general international law in this jurisdiction necessarily mirrors that of the United Kingdom; indeed, this could be part of the reason for some of the confusion in the basis and status of general international law within the Irish legal system.

[170] See Chapter 6.III.A. See also, in relation to the International Court of Justice e.g. *Re Article 26 and the Criminal Law (Jurisdiction) Bill* [1977] IR 129.

[171] "In the consideration of these questions, the Court is entitled not only to regard cases decided by competent Courts but also the opinions and writings of eminent Judges and jurists on public international law": *McEvoy v. Owners of S.S. Otto* [1942] IR 148, at 161 (per Hanna J.). See also *The State (Duggan) v. Tapley* [1952] IR 62; *Government of Canada v. Employment Appeals Tribunal* [1992] 2 IR 484; *McElhinney v. Williams* [1995] 3 IR 382; *Horgan v. An Taoiseach* [2003] 2 IR 468.

[172] International agreements of a multilateral character often combine codification of existing international law and its progressive development. Where a treaty is widely recognised as replicating the position under general international law, it is a valuable means of demonstrating that law, whether or not a particular state is a party to that treaty: see e.g. *McGimpsey v. Ireland* [1988] IR 567 (Vienna Convention on the Law of Treaties). Treaties may also be useful in other respects: for example, the pattern of treaties in the same form may offer insights into States' positions on matters of international law as may the recitals in treaties: see e.g. *The State (Duggan) v. Tapley* [1952] IR 62.

[173] In particular, in an age of international organisation, the resolutions and decisions of international organisations, for example, those of the United Nations General Assembly. See e.g. the early

question remains to what extent do these documents provide evidence of the practice of States and of States' belief in its legally binding character.

While the Irish courts have referred to many of the usual sources of evidence on the practice and *opinio juris* of States and have on occasion conducted detailed examinations of the status and scope of rules of customary international law, its approach to the difficult task of identifying customary international law has not been free of error. In *McElhinney*, for example, Hamilton C.J. expressed the view that "the principles set forth in individual state legislation cannot be regarded as establishing principles of public international law". The Chief Justice then expanded on this view, stating:

> In accepting the generally recognised principles of international law as its rule of conduct in relations with other states, the State should not be concerned with the attitude of other states with regard to similar immunities.[174]

In relation to the first statement, while it must be admitted that the principles set forth in the legislation of States cannot of themselves establish principles of public international law, in appropriate circumstances, they may legitimately be taken into account in determining the practice of States on a question of customary international law. However, in the second statement, Hamilton C.J. betrays a fundamental misunderstanding of the nature of customary international law: it consists of the practice of States and the courts, and any other bodies entrusted with the task of identifying and applying the rules of customary international law, are of necessity concerned with the attitude of other States to those rules.[175] Another problematic feature of the Irish courts' approach to identifying customary international law, which has increased over time, has been to assume the existence of a rule of customary international law without fully examining its proof or its parameters.[176]

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discussion of the Universal Declaration of Human Rights in *The State (Duggan) v. Tapley* [1952] IR 62, at 82-83, at a time when Ireland had yet to become a member of the United Nations and when the Declaration itself was very much in its infancy (less than two years old): "This Declaration does not, however, purport to be a statement of the existing law of nations. Far from it. The declaration itself states that it proclaims "a common standard of achievement....". The Declaration, therefore, though of great importance and significance in many ways, is not a guide to discover the existing principles of international law".

[174] *McElhinney v. Williams* [1995] 3 IR 382, at 405.

[175] As Symmons comments, "it represents a very parochial viewpoint as to the material sources of customary international law and the evidential proof requirements of international law; and indeed it is clearly out of step with past practice in this regard in international tribunals": Symmons, note 40 (Biehler), at 120.

[176] See e.g. *Kavanagh v. Governor of Mountjoy Prison* [2002] 3 IR 97; *Horgan v. An Taoiseach* [2003] 2 IR 468.

The identification of customary international law is very often a difficult task, ill-suited to national courts. This difficulty is evident in the approach of the Irish courts. While a number of early decisions adopt a careful approach to the task, on some occasions in the more recent case-law, there has been a failure to appreciate the fundamental elements of customary international law and, even where these are fully understood, there has been heavy reliance on a limited range of national judicial decisions and scholarship. Notwithstanding the difficulties which attend the task of identifying such rules, it is important that courts undertake that task with a high degree of care and attention, particularly in light of the fact that their decisions in turn may be regarded as evidence of practice, may play a role in determining the status or scope of such rules and place limitations on the approach of the executive and indeed the legislative organs of government in their activities in the international field.

F. Effect of Customary International Law

Having established that custom forms part of Irish law through the common law and its rules identified by the Irish courts, it is necessary to consider the central question relevant to its implementation in the Irish legal system. What does it mean to form part of Irish law? What is the effect of customary international law within the Irish legal system? A bundle of concepts such as standing, direct effect, invocability, and justiciability are often used in answering this question. In the judicial consideration of Article 29.3, as we have already seen, the fact that the generally recognised principles of international law were accepted as Ireland's "rule of conduct in its relations with other States" was understood as excluding that provision from conferring rights on individuals. More broadly, that provision, which was simply a guide in the State's inter-State relations, was held to be non-justiciable. To what extent do similar concerns apply to the customary international law as part of the common law?

It is true that customary international law applies primarily to inter-State relations and, in most cases, its rules do not affect or confer rights on individuals and other non-State actors. However, as the international community has changed over the past century, the rules of customary international law have evolved accordingly. Custom affects legal persons other than States, international organisations and individuals being the most obvious examples.

In *Horgan*, Kearns J. identified a number of categories of cases in which customary international law could be "admissible in domestic law".[177] First, in certain limited situations, it may be availed of "to determine private law claims", absent some contrary or conflicting provision of Irish law.[178] Secondly, it may also avail "other states in their dealings with this State on the international plane".[179] However, customary international law could not "impose binding public law obligations on the executive towards its own citizens under Article 29".[180] Even leaving aside the varying legal basis for custom within these categories, it is clear that they offer no principled guide to the circumstances in which customary international law may be invoked and applied by the Irish courts.

Assuming that it is through the common law rather than Article 29.3 that custom takes effect in Irish law, there is no *a priori* bar on individuals, or other legal persons, invoking the rules of customary international law in the Irish courts. That law is invocable in the same manner as other rules of the common law. In *ACT Shipping*, Barr J. expressed the view, in the context of the right to refuge invoked by the plaintiff, that because custom formed part of Irish law subject to its consistency with the Constitution, statute, and common law, any issue, including a claim for damages, arising on foot of such a right under customary international law was "justiciable in the Irish domestic courts" and the State was "answerable to an injured party for wrongdoing by any state body relating to such a custom or practice".[181] While this is undoubtedly the corollary of accepting custom as part of the common law, this dictum must be understood in the context of the facts of the particular case, the plaintiff having been directly and adversely affected by the defendant's interpretation and application of the rule of customary international law on which the plaintiff had sought to rely. It does not of itself mean that all rules of customary international law are capable of, and appropriate for, direct application in the courts.

Issues of standing and justiciability may continue to be relevant in determining whether rules of customary international law should be applied by the Irish courts.

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[177] *Horgan v. An Taoiseach* [2003] 2 IR 468, at 513.

[178] This would seem to be a reference to the *ACT Shipping* case where a foreign corporation unsuccessfully sued a Minister of the Government for damages for negligence.

[179] This appears to be a reference to the sovereign immunity cases (*Government of Canada, McElhinney, Schmidt*) although it is not clear how the application of custom as domestic law in this context engages the states "on the international plane".

[180] *Horgan v. An Taoiseach* [2003] 2 IR 468, at 513. This statement has echoes of the old position that a subject could not complain of a breach of customary international law by the Crown in a British court: *West Rand Gold Mining Co. v. Rex* [1905] 2 KB 391, at 409.

[181] [1995] 3 IR 406, at 421.

First, the standing of a party clearly affects the ability to rely on a rule of customary international law. If a party has no legal interest in the rule, is not affected by it in any material way or the rule is of no relevance to the claim being made, it follows that the party invoking the rule has no standing to do so. In many cases, however, this may require the court to consider carefully the nature of the rule and its application to the case. In many of the Irish cases, standing has simply not being an issue. In the *Government of Canada*, *McElhinney* and *Schmidt* cases, for example, the party relying on the rule of sovereign immunity was a foreign State or one of its officials, precisely the persons entitled to do so.[182] Just as importantly, however, the party against whom the rule was being invoked was also entitled to rely on the exceptions or limitations to that rule or simply to contest its applicability on the facts, as in the early case of *de las Morenas*.[183] In other words, standing is encompassed within the general consideration of the application of the rule on the facts of the case, not an artificial device to exclude claims based on such rules *in limine*.[184]

Secondly, the justiciability of an issue of customary international law may well be an important factor in determining whether it can, or should, be applied by a domestic court. The legal character of customary international law has been stressed

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[182] Indeed, the doctrine of sovereign immunity – as in the *Government of Canada* and *McElhinney* cases - provides a useful illustration of some of these problems. Now that a restrictive doctrine of sovereign immunity has been accepted, the prospect of States being held to account by individuals in national courts when acting in a commercial capacity (i.e. outside the restricted sphere of sovereign activity) presents itself. In these circumstances, it cannot seriously be contended that, while a State can rely on rules of international law, individuals engaged in litigation cannot (e.g. by raising the exception to doctrine of sovereign immunity). Admittedly, this can be countered with the argument that, when applying this limited rule of international law or exception, one is merely removing immunity and allowing domestic jurisdiction and law to apply; yet this is a not a full or satisfactory response to the underlying problem. This is just one of a range of practical anomalies to which the rule in *O Laighleis* gives rise. Other related difficulties include whether an individual, while not entitled to directly invoke or rely on a rule of general international law, may raise such an issue in defence of a claim or in response to international law arguments raised e.g. by a State litigant; and when an issue is one of national law or of international law or both. The position is also problematic from an Irish constitutional perspective. In view of the protection of the individual's rights to equality before the law, fair procedures and access to the courts, why should a foreign State or the President (within the context of Article 26 references) or an international organisation be entitled to rely on general international law whereas an individual, such as an Irish citizen, cannot? International law is a vast and diverse sphere and there may be reasons relating to the character and effect of the law that warrant such a distinction. There may be areas – for example, the conduct of war and making of peace - which remain very much within the domain of purely inter-State relations; there are many others which affect individuals and, where the relevant international law is accepted and their rights to access the courts is constitutionally enshrined, there is little sense or justice in barring such individuals from raising issues of international law. However, the approach currently taken does not cater for such distinctions; it flatly excludes the standing of individuals to rely on general international law, at least insofar as it is accepted in Article 29.3.

[183] *Saorstát and Continental SS. Co. v. de las Morenas* [1945] IR 291.

[184] Symmons aptly comments that that "to have an automatic incorporation doctrine *per se*, without the attendant right of locus standi, is in any case nonsensical as it constitutes an instance of judicial giving with one hand, only to then take it away immediately with the other": see Symmons, note 40 (Biehler), at 150.

throughout this chapter. A rule of customary international law does not lose its legal character by reason of not being justiciable in a domestic court. Such a rule which might be capable of being applied on the international plane, for example, by an international tribunal before which both or all of the States affected by it may consent to appear, to adduce evidence, and to make submissions. However, in some cases, a domestic court will simply not be in a position to adjudicate upon an issue of customary international law and, in other cases, it may be wholly inappropriate for it to do so. The reasons for this are various: for example, it may involve an Irish court adjudicating upon the conduct of other States, whether or not they appear before it in some capacity (concerns which underlie the United Kingdom's act of State doctrine[185]); it may involve an Irish court trespassing on to matters properly within the domain of the executive (for example, the recognition of foreign States) or indeed the legislative organ of government (for example, the decision to declare war or otherwise to participate in an international conflict). The *Horgan* case is a good example of such a case. The plaintiff sought to rely on rules of customary international law governing the conduct of a neutral State vis-à-vis belligerent States in times of war in order to challenge the constitutionality of the Government's decision to allow the use of Shannon Airport as a stop-over for US aircraft engaged in military action against Iraq. Such rules of customary international law are directed exclusively at the conduct of States *inter se*. If there is a breach of those rules, it is for the State which has been affected by that breach (most obviously, one of the belligerent parties) to invoke the international responsibility of the neutral State. The legal position of other States may be raised before the domestic court of another State without those other States having any role, representation or right of audience. As a result, factual and legal issues of great controversy may be dealt in the absence of relevant parties. Moreover, the rules clearly do not confer rights on, or otherwise affect the legal position of, individuals. Their purpose is to regulate the conduct of States in a time of war. This is a matter which, under the 1937 Constitution, lies first and foremost with the political organs of government. It necessarily involves issues of a highly sensitive political character. While Kearns J. invoked the language of justiciability in dismissing the claims under Article 29.1 and 29.3 for the reasons already discussed, it may have been more appropriate for the Court to relate the issue of justiciability more closely to the particular rule of customary international law being invoked. If the non-justiciable nature of the subject-matter in *Horgan* is

[185] See e.g. Shaw, note 4, at 162-172.

reasonably clear, it may be less so in the case of other rules of customary international law. In defining the scope of justiciability in this context, as in others, the courts must take great care in drawing the lines.

In practice, the Irish courts have frequently considered, to some extent, the merits of the substantive issues of customary international law raised before them often only to dismiss these arguments on the grounds of standing or justiciability. If, as suggested in this chapter, common law is the legal basis for custom within the Irish legal system, the courts will have to formulate a sound basis for distinguishing between those rules which are and are not capable of judicial application. It is open to question whether analogous criteria – such as those used to determine whether an international agreement has direct effect in the EU legal system – may provide assistance in formulating such a test.

The courts may also take customary international law into account in cases where a party is not seeking to rely directly upon it or to challenge domestic law by reference to it. One example of this is in the case of a court determining the scope and limits of the State's jurisdiction, a question which inevitably requires consideration of international law. The complicated history of the original Articles 2 and 3 of the 1937 Constitution is testimony to the fact that a State's jurisdiction, territorial, maritime or otherwise, is only effective insofar as it is in accordance with international law. In the course of the proceedings in *Re Article 26 and the Criminal Law (Jurisdiction) Bill 1975*,[186] the legislation which resulted from the Law Enforcement Commission Report, it was argued that Articles 2 and 3 constituted a prohibition on the Oireachtas legislating with extra-territorial effect in relation to matters occuring in Northern Ireland pending the re-integration of the national territory. The Supreme Court, satisfied "that Saorstát Eireann had full power to legislate with extra-territorial effect from 1922", rejected this contention and invoked the rule of international law, articulated by the Permanent Court of International Justice in the *Lotus Case*, that "every sovereign State has power to legislate with extra-territorial effect in the sense that it may enact that acts or omissions done outside its borders are criminal offences which may be successfully prosecuted within its borders.... provided that the events, acts or persons to which the enactment applies bear upon the peace, order and good government of the legislating State".[187]

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[186] *Re Article 26 and the Criminal Law (Jurisdiction) Bill* [1977] IR 129.
[187] *Re Article 26 and the Criminal Law (Jurisdiction) Bill* [1977] IR 129, at 149.

Custom may also be applied in other circumstances. For example, the courts have frequently had recourse to customary international law in issues arising under the law of treaties. Even before the State ratified the Vienna Convention on the Law of the Treaties in 1969, which has not been given effect within Irish law, the Irish courts relied on its provisions insofar as they represented customary international law in a number of contexts: interpreting international agreements; determining whether a third State could be bound by a convention; determining whether the State was obliged to ratify a convention which it had signed. So too, custom, like international agreements, can be used as an aid to the interpretation of Irish law. The principle that Irish law must be interpreted, insofar as it is possible to do so, in a manner consistent with international law, includes customary international law within its remit. Similarly, in appropriate cases, custom may also be used as an aid in the determination of other rules of common law and of public policy, for example in the context of private international law.[188]

As this brief overview indicates, there are many ways in which customary international law may be given effect within the Irish legal system. In determining whether a rule of customary international law can be invoked and directly applied in a particular case, the courts must examine carefully the nature of the particular rule. As part of the common law, there is no necessary bar to the application of customary international law. While many rules will only be appropriate to application in an inter-State context, other rules may affect, directly and indirectly, the legal position of other persons. As a result, care must also be taken in drawing the lines between those rules upon which parties can rely in the Irish courts and those upon which they can not. The doctrine of justiciability certainly has a role to play in this regard but, as it stands in Irish law, it is too vague to provide guidance in particular cases. More frequently, parties, or even the Court itself, may invoke customary international law not in order to rely upon it directly as a rule of decision in a case but as an aid to interpretation or determination of Irish law. In conclusion, although custom plays a marginal role in the Irish legal system, in line with what Dominicé and Voeffray suggest is generally the case, it is nevertheless important.

G. Assessment

[188] See Shaw, note 4, at 165.

Confusion and uncertainty, even a kind of schizophrenia, have characterised the Irish legal system's approach to customary international law. The Irish courts have generally recognised the place of custom in the Irish legal system, at least where its recognition does not challenge any rule of Irish law. Yet, on occasion, and particularly where a rule of Irish law is challenged, the courts have retreated from this position, sometimes going so far as to question the legally binding character of custom. Although there has consequently been a distinct failure to articulate a coherent approach to the implementation of custom in the Irish legal system, the weight of authority suggests that custom forms part of Irish law through the common law and that this is an automatic process not requiring any domestic act of reception of a particular custom. This may loosely be considered a 'monist' approach. However, the real issue is the status and effect of custom within the Irish legal system.[189] As we have seen, custom's place in the Irish legal system has been secured at the expense of its hierarchical status. Moreover, it remains to be seen in what circumstances the Irish courts will invoke justiciability or other avoidance doctrines to deny effect to custom. Although issues of customary international law arise only rarely in practice, it is nonetheless incumbent on the courts, when confronted with such issues, to articulate a clear understanding of the effect of custom within the Irish legal system and to engage more effectively with this longstanding source of international law and also of Irish law.

[189] On proposals for an amendment to Article 29.3, see Symmons, note 40 ("Suggestions"), and the All-Party Oireachtas Committee on the Constitution, *Eighth Progress Report: Government* (Stationery Office, 2003), at 26 (suggesting the following wording, "Ireland accepts the generally recognized principles of international law as its rule of conduct in its relations with other States *and in its relations with individuals, and shall be bound by those principles save where provision is made by law to the contrary*"). While this proposal would undoubtedly have the benefit of adding more clarity to the status of custom in Irish law, it could nevertheless give rise to difficulties of interpretation of its own. In any event, an amendment to this effect seems politically unlikely at this juncture.

IV. IMPLEMENTATION IN THE EUROPEAN UNION LEGAL SYSTEM

A. Introduction

If the relationship between the European Union, as an innovative and advanced form of international organisation of regional scope, and international law was occasionally difficult and ill-defined in its early days,[190] the EU, as it has developed its role in international relations, has consistently affirmed its commitment to international law.[191] This is expressly recognised in the European Treaties. In Article 3 TEU, the Union's catalogue of objectives, includes, in para. 5, that "in its relations with the wider world", it shall contribute *inter alia* "to the strict observance and the development of international law, including respect for the principles of the United Nations Charter".[192] Thus commitment to international law is central to the EU's external action and its self-image as an international actor.

Unlike the position in respect of international agreements, however, the Treaties contain no specific reference to customary international law. There are a number of different dimensions to the EU's relationship with customary international law. On the one hand, while custom is defined by reference to States specifically as discussed in the introduction, as the EU's role in international relations has expanded, so too has the EU's practice, and its contribution to the practice of Member States, in international law.[193] On the other hand, the EU, as an international

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[190] See e.g. Timmermans, "The EU and Public International Law" (1999) 4 *European Foreign Affairs Review* 181.

[191] For an early analysis, see e.g. van der Meersch, "L'ordre juridique des communautés européennes et le droit international" (1975) 148 *Recueil des cours* 1. For more recent reviews, see Wouters and van Eeckhoutte, "Giving Effect to Customary International Law through European Community Law" *Catholic University of Leuven Institute for International Law Working Paper No. 25/2002* and Kuijper, "Customary international law, decisions of international organisations and other techniques for ensuring respect for international legal rules in European community law" in Wouters, Nollkaemper and de Wet eds, *The Europeanisation of International Law: the Status of International Law in the EU and its Member States* (TMC Asser Press, 2008), Chapter 6.

[192] This is reiterated in Article 21.1 (the general provision on the EU's external action) which provides:

> The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

This is echoed in para. 2(b) of Article 21 which provides that the Union "shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations", in order to, *inter alia*, "consolidate and support democracy, the rule of law, human rights and the principles of international law".

[193] For an excellent survey, see Hoffmeister, note 12.

legal person, is bound by customary international law and must respect it internationally and internally. Depending on the rule of customary international law in question and the circumstances in which it falls to be applied, it may be the EU institutions themselves or the Member States which are required to give effect to that rule. This section examines how customary international law is given effect within the EU legal system. In contrast to the Irish position, notwithstanding the lack of any express provision, the issue of the legal basis for custom has been uncontroversial. Similarly, the issues of the mode of implementation and the hierarchical status of custom within the EU legal system have not generated a great deal of controversy. The real issue has been whether, and to what end, custom may be relied upon in the EU legal system. As with international agreements, it has been primarily for the Court of Justice to determine the questions to which these issues give rise.

B. Legal Basis for Implementation

Although the Treaties declare the Union's respect for the principles of international law, in contrast to the position in respect of international agreements, they do not make an explicit reference to customary international law. However, over time, as issues of customary international law came before the Court of Justice more and more directly, the Court had to determine the place of customary international law in the EU legal system.

In *Poulsen*,[194] a Danish court referred a number of questions to the Court of Justice on the relationship between a Regulation on technical measures for the conservation of fishery resources and the international law of the sea. At the time of the case, the United Nations Convention on the Law of the Sea, to which the EU and the Member States are parties, had not yet come into force[195] but many of its rules were recognised as forming part of customary international law.[196] The case concerned a vessel 'Onkel Sam', of which Poulsen, a Danish national, was master and which had a Danish crew. The vessel was owned by a Panamanian company (which in turn was wholly owned by a Danish national), was registered in Panama and flew the Panamanian flag. The vessel had caught several thousand kilogrammes of salmon on the high seas of the North Atlantic Ocean and, on its way to sell its

[194] Case C-286/90 *Poulsen* [1992] ECR I-06019.
[195] Although the Convention entered into force on 16th November 1994, the EU's formal confirmation took place on 1st April 1998.
[196] Case C-286/90 *Poulsen* [1992] ECR I-06019, at para. 10.

cargo in Poland, got into difficulty as a result of bad weather and engine trouble which required the vessel to head to a Danish port. The Danish authorities brought charges against the master and the owner of the ship for having salmon on board in breach of the Regulation. In the Danish court's reference to Luxembourg, an array of issues were raised in relation to the scope of the Regulation and the Danish court's entitlement to assert jurisdiction thereunder. Before addressing the substantive issues of international law, the Court observed, as a preliminary point, that "the European Community must respect international law in the exercise of its powers".[197] On this basis, the Regulation had to be interpreted, and its scope limited, "in the light of the relevant rules of the international law of the sea". The Court then addressed the issues raised in the preliminary reference, concluding that the Regulation could be applied to a non-EU vessel "when it sails in the inland waters or, more especially, is in a port of a Member State, where it is generally subject to the unlimited jurisdiction of that State",[198] in which circumstances "the national court may in principle order the confiscation of a cargo of salmon".[199] Finally, in respect of the issue raised as to the applicability of the Regulation "in the case of vessels from non-member countries which have entered a port of a Member State owing to a situation of distress", the Court ducked the question: none of the Regulations adopted contained "any provision allowing a vessel in a situation of distress to escape the prohibition"[200]; in those circumstances, "the question concerning the legal consequences of the situation of distress does not concern the determination of the sphere of application of Community legislation, but rather the implementation of that legislation by the authorities of the Member States"[201]; and, accordingly, it was "for the national court to determine, in accordance with international law, the legal consequences which flow, for the purpose of the abovementioned Article 6, from a situation of distress involving a vessel from a non-member country".[202] While the Court's decision to leave the question of distress to the Danish court has been criticised,[203] the most interesting aspect of this case is the wide-ranging examination of customary international law undertaken by the Court and its initial and important statement of

[197] *Ibid.*
[198] Case C-286/90 *Poulsen* [1992] ECR I-06019, at para. 29.
[199] *Ibid.*, at para. 34.
[200] *Ibid.*, at para. 36.
[201] *Ibid.*, at para. 37.
[202] *Ibid.*, at para. 38.
[203] Kuijper, note 191, at 93; Wouters and Van Eeckhoutte, note 191, at 10.

principle that the European Community was bound to respect international law in the exercise of its powers.

In the *Racke* case, the Court took this one step further.[204] Racke was a German company which imported wines from Kosovo, taking advantage of preferential tariffs available under the EEC-Yugoslav Cooperation Agreement. When the Council suspended the Cooperation Agreement by Regulation in 1991 as a result of the conflict in the Balkans, and the German tax authorities refused to apply the preferential tariffs, Racke challenged the validity of the Regulation on the basis that the suspension of the Cooperation Agreement was invalid under customary international law, relying on the conditions laid down for termination on account of a fundamental change of circumstances in Article 62 of the Vienna Convention on the Law of Treaties. After affirming its jurisdiction, the Court referred to its statement of principle in the *Poulsen* case and stated that the Community was "therefore required to comply with the rules of customary international law when adopting a regulation suspending the trade concessions granted by, or by virtue of, an agreement which it has concluded with a non-member country".[205] The Court continued:

> It follows that the rules of customary international law concerning the termination and the suspension of treaty relations by reason of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order.[206]

In a similar manner to its judgment in *Haegeman* in the context of international agreements,[207] the corollary of the binding effect of the rules of customary international law on the EU was that such rules formed part of its "legal order". The *Racke* case will be considered further when the effect of custom in the EU legal system is examined. For present purposes, it suffices to note that the Court of Justice recognised the place of custom within the EU legal system notwithstanding the lack of an express provision in the Treaties.

While the Court has accepted custom as part of the EU legal system, its legal basis has not been explicitly specified. It is not to be found in the text of the Treaties, which merely recognise international law as a guideline for the Union's action, but in the general principles of EU law, a body of law developed by the Court of Justice, by which the EU institutions and Member States are bound, but which is subsidiary to

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[204] C-162/96 *Racke* [1998] ECR I-3655.
[205] *Ibid.*, at para.45.
[206] *Ibid.*, at para. 46.
[207] See Chapter 3, Section IV.A.

the Treaties themselves.[208] The general principles of law – which are an important part of the EU legal system – include fundamental rights, proportionality, legal certainty, non-discrimination and transparency.[209] They serve not only as interpretive aids in relation to the Treaties and secondary legislation but also as grounds of review by reference to which secondary legislation and other acts of the institutions as well as national measures falling within the scope of EU law may be invalidated. Like the other general principles of EU law, customary international law is widely recognised within the legal systems of the Member States, albeit in different ways and to different degrees.[210] Although the Court has not explicitly classified the rules of customary international law as general principles of EU law, this legal basis is consistent not only with the unwritten nature of the law, and with the general tendency of legal systems to assimilate custom in this way,[211] but also with the hierarchical status of custom, which will be explored in a later section.

C. Mode of Implementation

In contrast to the vigorous debate in common law systems, there has been little controversy within the EU legal system in respect of the mode of implementation of custom. Custom, like other general principles of law, forms part of the legal system without the requirement for any domestic act of recognition or reception.[212] In other words, as Rosas has stated,

> While the EU Courts do not seem to have made explicit pronouncements to this effect, their case-law appears to be based on the idea that customary international law, too, is directly applicable in the EU legal order (which is not to say that it would have direct effect), in accordance with a monistic approach.[213]

This is consistent not only with the position generally adopted in the legal systems of Member States[214] but also with the position adopted in respect of international

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[208] Having regard its binding nature and its forming part of EC legal order, "absent a detailed explanation for that proposition, one may assume that it came to that conclusion by reference to a general principle of Community law common to the Member States…": Hoffmeister, note 12, at 55.
[209] See generally Tridimas, *The General Principles of EU Law* (2nd ed, Oxford University Press, 2007).
[210] See Dominicé and Voeffray, note 24, and Wildhaber and Breitenmoser, note 36.
[211] Stirling-Zanda, note 126.
[212] See Hoffmeister, note 12, at 55.
[213] Rosas, "The European Court of Justice and Public International Law", in Wouters, Nollkaemper and de Wet eds, note 191, at 80.
[214] See Dominicé and Voeffray, note 24.

agreements within the EU legal system.[215] However, as the case-law on international agreements so clearly demonstrates, the fact that custom automatically forms part of the EU legal system does not necessarily mean that it will automatically have direct effect in the EU legal system.

D. Status of Customary International Law

As already discussed, the Court of Justice has recognised, since *Poulsen*, that the European Union must respect international law, including customary international law, in the exercise of its powers. *Racke* not only confirmed that custom formed part of the European Union legal system; it also confirmed that a party may rely on a rule of customary international law as a basis for challenging the validity of measures of EU law. Although, as will be seen presently, the Court of Justice limited considerably the scope of review it could undertake by reference to the customary rule invoked, limiting it to "manifest errors of assessment" by the Council,[216] and ultimately upheld the validity of the Regulation,[217] it nonetheless recognised the important principle that an individual could invoke the rules of customary international law to challenge validity of the Regulation in question.[218] In light of the fact that customary international law – at least in certain circumstances – could be invoked to invalidate secondary legislation, it is clear that that body of law would prevail over such legislation in the case of conflict. Thus, similar to other general principles of EU law, and to international agreements, customary international law occupies an intermediate status between the primary law of the Treaties and secondary legislation.[219] In *Kadi*, the Court of First Instance found that it could review EU regulations implementing UN Security Council resolutions only by reference to certain rules of customary international law, *jus cogens*, on the basis that even the Security Council could not derogate from these rules in its action under the UN Charter.[220] However, the Court of Justice, allowing the appeal, rejected such a

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[215] Chapter 3, Section III.A.
[216] C-162/96 *Racke* [1998] ECR I-3655, at para.52.
[217] *Ibid.*, at para.60.
[218] *Ibid.*, at para.51.
[219] See e.g. Hoffmeister, note 12, at 55: "Customary international law must therefore be observed in the Community legal order. In particular, it enjoys precedence over secondary law".
[220] T-315/01 *Kadi* [2005] ECR II-3649, at paras. 226-230. Leaving aside the appropriateness of review by reference to *jus cogens*, the Court of First Instance's judgment in respect of the identification and application of alleged rules of *jus cogens* raises serious issues, both of substance and of method. See

restrictive standard of judicial review and found that EU implementing regulations for UN Security Council resolutions must, like all secondary legislation, be subject to "the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law".[221] While not directly engaging with the question of possible review in light of customary international law (either generally or confined to *jus cogens* specifically), the Court, citing *Poulsen* and *Racke*, reiterated that the EU "must respect international law in the exercise of its powers" and that "a measure adopted by virtue of those powers must be interpreted, and its scope limited, in the light of the relevant rules of international law".[222]

Thus, while recognising custom as hierarchically superior to secondary legislation, as the *Poulsen* and *Kadi* cases demonstrate, the Court of Justice will endeavour to interpret secondary legislation in a manner which is consistent with customary international law, as it also does in the case of international agreements. While this latter principle is replicated in the Irish legal system, there is a clear difference between the hierarchical status of custom in the Irish and the EU legal systems. Whereas in Ireland, custom is inferior not only to the Constitution and statute but also other rules of the common law, in the EU it is subject to the Treaties alone (as understood in light of other general principles such as the respect for fundamental rights) and prevails over any inconsistent secondary legislation. If the Irish and EU courts were to come to different conclusions on an issue of customary international law in a case coming before them, the EU courts' approach would in these circumstances prevail. However, the prospect of such conflicts may be remote and *Racke* underlines the fact that the status of custom, in real terms, depends largely on the extent to which its rules are given effect within the EU legal system.

E. Identification of Customary International Law

As the Irish experience demonstrates, the identification of rules of customary international law is often a difficult and unfamiliar task for domestic courts. In its jurisprudence touching upon issues of customary international law, the European

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e.g. Poli and Tzanou, "The *Kadi* Rulings: A Survey of the Literature" in Cremona, Francioni and Poli eds, *Challenging the EU Counter-Terrorism Measures through the Courts* (Academy of European Law, 2010), at 156. On the question of *jus cogens* in internal law more generally, see Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press, 2006), Chapter 18 ("Techniques of Interaction of International Jus Cogens with National Law").

[221] Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] ECR I-6351, at para. 326.

[222] *Ibid.*, at para.291.

courts have given little insight into the process by which they identify a rule of customary international law. However, the sources on which the European courts rely are significant in understanding its approach to customary international law.

In *Poulsen*, after affirming that the European Community must respect international law in the exercise of its powers and that Community law must be interpreted in light of international law, the Court of Justice said that account had to be taken of the 1958 Geneva Conventions[223] and the United Nations Convention on the Law of the Sea (UNCLOS) "in so far as they codify general rules recognized by international custom".[224] Although UNCLOS had not yet entered into force, the Court, referring to a number of judgments of the International Court of Justice,[225] noted that "many of its provisions are considered to express the current state of customary international maritime law".[226]

In *Racke*, the applicant relied on Article 62 of the Vienna Convention on the Law of Treaties insofar as it reflected customary international law. The Court noted that, although the Convention did not bind the Community or all of its Member States, "a series of its provisions, including Article 62, reflect the rules of international law which lay down, subject to certain conditions, the principle that a change of circumstances may entail the lapse or suspension of a treaty", again citing the International Court of Justice to this effect.[227]

More recently, in *Intertanko*, the Court, in reaffirming its settled case-law that the powers of the Community must be exercised in observance of international law, noted that this included "provisions of international agreements in so far as they codify customary rules of general international law".[228] Applying this to the provisions of MARPOL, to which the Member States were parties, but not the Community, the Court concluded that it did not appear that the relevant provisions

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[223] Geneva Conventions of 29 April 1958 on the Territorial Sea and the Contiguous Zone, on the High Seas and on Fishing and Conservation of the Living Resources of the High Seas.
[224] Case C-286/90 *Poulsen* [1992] ECR I-06019, at para.10.
[225] *Ibid.* The Court referred to the judgments of the International Court of Justice in *Canada v. USA (Delimitation of the Maritime Boundary in the Gulf of Maine Region)* [1984] ICJ Reports 294; *Libya v. Malta (Continental Shelf)* [1985] ICJ Reports 30; *Nicaragua v. USA (Military and Paramilitary Activity)* [1986] ICJ Reports 111.
[226] *Ibid.*
[227] C-162/96 *Racke* [1998] ECR I-3655, at para. 24: "Thus the International Court of Justice held that `[t]his principle, and the conditions and exceptions to which it is subject, have been embodied in Article 62 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances' (judgment of 2 February 1973, *Fisheries Jurisdiction (United Kingdom v Iceland)*, ICJ Reports 1973, p. 3, paragraph 36)".
[228] C-308/06 *Intertanko* [2008] ECR I-4057, at para. 51.

were "the expression of customary rules of general international law".[229] However, neither the Court, nor indeed the Advocate-General in her opinion,[230] give any indication of how it reaches such a conclusion.

Insofar as it is evident from their decisions, in identifying customary international law, the European courts rely on two main sources and for two purposes: international agreements, particularly those which have been the subject of a codification process within the United Nations, to assist in determining the content of the rules of customary international law, and the decisions of international tribunals, particularly those of the International Court of Justice, to confirm the customary character of those rules.[231]

Kuijper has suggested that the courts would have more difficulty "recognising and applying customary international law if these sources and authorities were not readily to hand", citing as an example of this the Court of Justice's approach to the issue of distress raised in *Poulsen* which the Court avoided addressing on the basis that it was a matter for the Danish court.[232] As he observes, the identification of customary international law by reference to the classical elements of customary international law, consistent State practice and *opinio juris*, "is an arduous and complicated task for which courts generally are not well-equipped, the European Community courts being no exception".[233] Although there is sometimes more consideration of the content and the status of custom in the Opinions of the Advocate General in cases raising these issues,[234] it is remarkable

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[229] *Ibid.*

[230] Opinion of Advocate-General Kokott (20 November 2007), at para.39 ("Although the Court holds that the Community must respect international law in the exercise of its powers, its subsequent comments show that this statement relates to customary international law. In the present case, however, there is no evidence that the relevant provisions of Marpol 73/78 codified customary international law.")

[231] As Kuijper has observed, "the Community courts find customary international law primarily in international conventions to which the Community is not a party" and "nearly all rules 'found' ... come from these large codifying conferences: the conferences of Vienna on the law of treaties and the old and new Law of the Sea conferences", something "quite in line with modern trends in customary international law". He has also referred to the fact that the courts accept these sources largely on the basis of the jurisprudence of the International Court of Justice as being "an interesting example of deference among international courts". See Kuijper, note 191, at 95.

[232] *Ibid.*

[233] *Ibid.*, at 96.

[234] For example, in the case of *Racke*. See also the early preliminary reference from Ireland, Case 812/79 *Attorney-General v. Burgoa* [1980] ECR 2787, concerning the master of a Spanish vessel (Spain not yet being a member of the EC), who was prosecuted for fishing in Irish waters, (which were, since Ireland's accession, defined by EC law) and who pleaded in his defence antecedent rights under the 1964 London Fisheries Convention to which both Ireland and Spain were parties. In his opinion, Advocate-General Capotorti suggested that a new set of customary international law rules had abrogated the rules of the 1964 London Convention. However, the Court rejected this thesis, basing its decision on a new agreement (albeit not yet signed or ratified) having replaced the 1964 London Convention as between Spain and EC Member States such as Ireland. Klabbers suggests that

how little attention the jurisprudence pays to the identification of the rules of customary international law. There are a number of possible reasons for this. First, it may be a factor of the limited range of fields in which issues of custom have arisen in litigation to date, as well as a reflection of the state of the law in those fields in which the EU is directly engaged. Secondly, the style of the courts' judgments generally, which contrasts with that of common law courts, and which often articulate broad statements of principle with little reference to authority, may be reflected in its approach to custom specifically. Thirdly, the fact that the European Union's courts are international courts is significant, as its judgments may affect not only the parties before the courts but also governments and citizens of all twenty-seven Member States and this may explain the reliance on widely accepted international sources. Fourthly, and finally, the store which the EU courts have placed in certain conventions codified under the aegis of the UN and the judgments of the International Court, both of which generally attract a high degree of respect and indeed consensus among States generally in matters of customary international law, may be a reflection not only of the EU's and Member States' deference to those entities but also of the fact that the EU itself sits somewhat awkwardly within the traditional structure of customary international law. Nevertheless, as further issues of custom come before the EU courts, it will be interesting to see how their approach to identifying customary international law will evolve.

F. Effect of Customary International Law

As already seen in respect of international agreements, the fact that the Court of Justice has recognised a source of international law as forming part of the EU legal order does not of itself resolve the many questions surrounding the effect of that law within the EU legal order. Moreover, if international agreements sometimes provide guidance as to their implementation in internal legal systems, this is not the case for customary international law. Many of the considerations discussed in the context of the effect of custom in the Irish legal system – especially the inter-State nature of most rules of customary international law – apply in equal measure within the European Union legal order.

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the reasons for the Court's different approach was that it knew "very well that to find the existence of a new customary rule of international law would involve a great amount of research and would always be controversial, in particular if the new custom would be expected to have replaced an earlier treaty": Klabbers, *Treaty Conflict and the European Union* (Cambridge University Press, 2009), at 127.

In the *Opel Austria* case,[235] the applicant was an Austrian company which received Austrian state aid for the production of a type of car gearbox which it had imported to the EU since 1993. The European Community (as it then was) took the view that this state aid was in violation of the Free Trade Agreement which then existed between the EC and Austria and adopted on 20 December 1993 a regulation introducing an import duty on the gearbox produced by Opel Austria, which Opel Austria sought to annul. On 13 December 1993, the EC institutions had approved a European Economic Area (EEA) Agreement between the EC and its Member States and a number of third countries, including Austria. This Agreement prohibited measures equivalent to custom duties and entered into force on 1 January 1994. In its action, Opel Austria claimed that the Council, by adopting a regulation in conflict with the EEA Agreement just weeks prior to its entry into force, had violated the rule of customary international law embodied in Article 18 of the Vienna Convention on the Law of Treaties to the effect that a signatory to a treaty is obliged to refrain from acts which would defeat the object and purpose when prior to its entry into force. In other words, it was relying on a rule of customary international law in order to annul the regulation. The Court of First Instance recognised that the principle of good faith was "a rule of customary international law" and that it had been codified in Article 18 of the Vienna Convention of 1969.[236] The crucial element of the Court's reasoning followed:

> ...the principle of good faith is the corollary in public international law of the principle of protection of legitimate expectations which, according to the case-law, forms part of the Community legal order.[237]

Thus, the Court translated the rule of customary international law invoked into the language of one of its own general principles of law, that of legitimate expectations. Having done so, the Court effectively removed the difficulty of determining whether, and in what circumstances, a party could rely on a rule of customary international law to challenge a measure of EU law:

> Any economic operator to whom an institution has given justified hopes may rely on the principle of protection of legitimate expectations.[238]

Opel Austria could rely on the principle of legitimate expectations "in order to challenge the adoption by the institutions, during the period preceding the entry into

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[235] Case T-115/94 *Opel Austria* [1997] ECR II-00039.
[236] *Ibid.*, at para. 90.
[237] *Ibid.*, at para. 93.
[238] *Ibid.*

force of that agreement, of any measure contrary to the provisions of that agreeemnt which will have direct effect on them after it has entered into force".[239] Applying the principle to the facts of the case, the Court concluded that there had been an infringement of the principle of legitimate expectations.[240]

In *Opel Austria*, the Court of First Instance avoided grappling with the question of the effect of rules of customary international law within the EU legal system. However, in *Racke*, the Court of Justice was directly confronted with this issue. Racke's challenge to the regulation suspending the EEC-Yugoslav Cooperation Agreement on the basis of the principle of *rebus sic stantibus* was based on the conditions attaching to the principle as codified in Article 62 of the Vienna Convention of 1969. Having established that custom formed part of the Community legal order, as we have already seen, the Court proceeded to consider whether it could be relied upon by an individual to challenge the validity of a measure of EC law in the position of Racke. The Court situates Racke's position carefully within its legal context:

> .... the plaintiff is incidentally challenging the validity of a Community regulation under those rules in order to rely upon rights which it derives directly from an agreement of the Community with a non-member country. This case does not therefore concern the direct effect of those rules.[241]

By focusing on the applicant's end goal (that is, reliance on the provisions of the Cooperation Agreement), rather than on the means by which he sought to do so (that is, annulling the regulation on the basis of a breach of customary international law), the Court, not wholly convincingly, sought to situate the issue in more familiar ground. It continued in the following terms:

> ... an individual relying in legal proceedings on rights which he derives directly from an agreement with a non-member country may not be denied the possibility of challenging the validity of a regulation which, by suspending the trade concessions granted by that agreement, prevents him from relying on it, and of invoking, in order to challenge the validity of the suspending regulation, obligations deriving from rules of customary international law which govern the termination and suspension of treaty relations.[242]

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[239] *Ibid.*, at para. 94.
[240] *Ibid.*, at paras. 96-99 and 103-123.
[241] C-162/96 *Racke* [1998] ECR I-3655, at para. 47.
[242] *Ibid.*, at para. 51.

As a recognition of the entitlement of an individual to rely customary international law in order to challenge the validity of EU legislation, this paragraph is of major significance. This is all the more so because of the nature of the customary rules being relied upon by Racke: customary rules of treaty law, which are directed primarily at inter-State conduct (first and foremost the parties to the treaty in question) and do not confer rights on individuals. However, the scope of that entitlement more generally is unclear because the Court's expression of it is so carefully couched in the highly unusual facts of the particular case. Indeed, having established the individual's entitlement to rely on the relevant rule of customary international law, the Court proceeded to qualify it radically:

> ...because of the complexity of the rules in question and the imprecision of some of the concepts to which they refer, judicial review must necessarily, and in particular in the context of a preliminary reference for an assessment of validity, be limited to the question whether, by adopting the suspending regulation, the Council made manifest errors of assessment concerning the conditions for applying those rules.[243]

Thus, while the entitlement of the Court to review the validity of the regulation by reference to customary international law at the behest of an individual is recognised in principle, the standard and intensity of that review drastically curtails its effect in practice. This aspect of the Court's ruling has been sharply criticised.[244] It is clear that the Court, having recognised a principle of potentially far-reaching consequence which could seriously affect the conduct of the political organs of the Union and Member States, retreated from its full implications, thereby ensuring that the political organs of government enjoyed wide discretion in their international relations. Unsurprisingly, in light of this limited review, the Court ultimately rejected the applicant's challenge to the validity of the suspending regulation. It remains to be seen whether some of these issues will be addressed by the Court in future cases, such as the recent preliminary reference from the United Kingdom arising from the challenge by the Air Transport Association of America to the extension of the EU Emissions Trading Scheme to international aviation, which asks the Court of Justice

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[243] *Ibid.*, at para.52.

[244] "With due respect, it must be submitted that the latter restriction, apparently inspired by the Advocate General's opinion, is not only undesirable, but also legally unacceptable": Wouters and van Eeckhoutte, note 191, at 22. See *contra* Kuijper who considers that the Court's decision "was probably justified": Kuijper, note 191, at 95.

whether certain rules of customary international law can be relied upon in the context of the challenge to the EU legislation.[245]

In summary, therefore, while the Court in *Racke* took the significant step of allowing a private individual to invoke a rule of customary international law to challenge the validity of a measure of EU law, the restrictive approach adopted by the Court in defining that entitlement suggests that it may be of limited utility in practice. In approaching such issues, the EU courts, like the Irish courts, are faced with the task of defining, and refining, legal principles by reference to which it is possible to determine whether, and to what end, a rule of customary international law may be relied upon in internal courts.

Beyond *Opel Austria* and *Racke*, the courts have referred to and relied on customary international law in a wide range of circumstances. As in the Irish legal system, the EU courts have taken cognisance of customary international law in determining the scope and limits of the EU's jurisdiction, notably in the field of competition law.[246]

So too, the courts have recognised that custom may be used as an aid to the interpretation of EU law. *Poulsen* is a clear example of this, the Court stating that the relevant EU regulation had to be interpreted, and its scope limited, in light of the relevant rules of the international law of the sea.[247]

While the Court may be accused of avoiding the issue of customary international law in *Opel Austria*, that decision is nonetheless authority for the proposition that customary international law may be a source of inspiration for the other general principles of EU law, such as the principle of legitimate expectations in that case.[248]

Furthermore, in other areas such as international humanitarian law, where the EU is not a party to the Hague, Geneva and other main conventions, the EU has sought to promote compliance with these obligations as customary international law, for example, by the Council issuing guidelines "to all those taking action within the framework of the European Union to the extent that the matters raised fall within

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[245] Case C-366/10 *Air Transport Association of America & Others v. The Secretary of State for Energy and Climate Change* (ongoing, see the reference at OJ C 260, 25 September 2009).
[246] See e.g. Cases 89/85, 104/85, 114/85, 116/85, 117/85, 125 to 129/85 *Ahlström Osakeyhtiö* [1988] ECR 5193.
[247] Case C-286/90 *Poulsen* [1992] ECR I-06019, at para. 9. See also C-308/06 *Intertanko* [2008] ECR I-4057, at para.52.
[248] Case T-115/94 *Opel Austria* [1997] ECR II-00039, at para. 93.

their areas of responsibility and competence",[249] an increasingly important practical step as the EU engages in more and more missions abroad under the CFSP.

G. Assessment

The European courts have clearly recognised that customary international law forms part of the EU legal system. It binds not only the EU institutions in the exercise of their functions but also Member States in their implementation and application of EU law. While it has not been explicitly stated, the legal basis for custom appears to lie in the general principles of EU law, conferring upon its rules a status superior to that of EU secondary legislation. Custom also appears to enter the EU legal system without the need for any internal act of reception or recognition. Yet, as one finds across many European legal systems, these "generous statements of principles" are often "not reflected ... in court practice".[250] As *Racke* makes clear, the scope of review which the European courts are willing to undertake by reference to custom may be limited. Moreover, while the courts may be comfortable in applying clearly-established rules of customary international law, they may be less comfortable when faced with contested rules of customary international law. As more issues of customary international law come before the courts, the jurisprudence, which is still in its early stages, will undoubtedly develop a more nuanced approach.

[249] See the Council's Updated European Union Guidelines on promoting compliance with international humanitarian law (IHL): 2009/C 303/06 (replacing the original guidelines 2005/C 327/04).

[250] See Wouters, "Customary international law before national courts: Some reflections from a continental European perspective" (2004) 4 *Non-State Actors & International Law* 25, at 25-27.

V. CONCLUSION

While this chapter has been critical of the approach to the implementation of custom in the Irish and EU legal systems in many respects, an examination of the approach of these systems highlights clearly the real difficulties facing internal legal systems in applying customary international law. First, there are very basic practical difficulties in identifying and applying in a domestic context a rule of customary international law, an unfamiliar and somewhat mysterious task for many courts. Secondly, there are difficulties of principle such as how customary international law can be understood and legitimated in an era of constitutional democracy and separation of powers. In their jurisprudence, both the Irish and European courts have grappled with these difficulties, sometimes explicitly, sometimes tacitly.

While both the Irish and the EU legal systems recognise custom as part of internal law and assimilate it with other unwritten rules in their legal systems, the status of custom is hierarchically superior in the EU system, where it prevails over inconsistent EU secondary legislation and national law. In contrast, in the Irish legal system, custom is recognised as part of the law but only at the lowest rung of legal norms. Thus, where custom is applied by the European courts and given effect through EU law, its status within the Irish legal system is significantly higher than that which it would otherwise enjoy. In light of the express constitutional commitment to international law in Article 29.3 of the 1937 Constitution, there is some irony in this position. However, as in other areas discussed in this thesis, the pattern is clear. Where a norm of international law is recognised as being part of the EU legal system, it generally enjoys supremacy vis-à-vis the law of Member States. At the same time, in both the Irish and EU legal systems, the effect of custom is also subject to certain limits, essentially in the form of an exclusion or restriction of the scope of judicial review by reference to custom, resulting in much uncertainty as to the precise scope of its internal effect. In both systems, the implementation of custom is characterised by a certain ambivalence, perhaps reflecting the difficult issues of practice and of principle which are not always explicitly addressed in judicial decisions.

While the approach of both systems can be labelled 'monist' – in the sense that there is no explicit requirement for a domestic act of reception and thus custom automatically forms part of the law (albeit that its effect or application may be excluded on other grounds) – the debate in the Irish legal system about whether its

approach is monist or dualist shows not only how little there is between these labels when loosely applied but also how little light they shed on the real issues which arise in the implementation of customary international law.

Because of the nature of the source, the similarities of approach and the scarcity of case-law, the effect of EU membership on the implementation of custom in the Irish legal system is less pronounced than in the case of international agreements. Yet, as the EU continues to consolidate its role in international relations and issues of international law more frequently come before its courts, it is likely that the European courts will increasingly be called on to identify and apply rules of customary international law. When they do so, the effect of their decisions will bind the Irish courts, at the very least within the scope of EU law. However, because of custom's general applicability and the unsustainability of divergent approaches according to whether a customary rule falls within the scope of EU law or Irish law, such decisions will likely have a radiating effect beyond the scope of EU law. In such cases, while there may very well be some form of dialogue between the European and national courts and indeed, explicitly or in disguised form, between the judicial and political organs, the European courts are likely once again to assert their jurisdiction to have the ultimate say.

CHAPTER 5.

IMPLEMENTATION OF ACTS OF INTERNATIONAL ORGANISATIONS IN THE IRISH LEGAL SYSTEM: THE CASE OF UNITED NATIONS SECURITY COUNCIL RESOLUTIONS

I. INTRODUCTION

The rise of international organisations with the capacity to take decisions and, in some cases, to make laws which are binding on their members has been one of the most important developments in the modern international legal system.[1] Although the legally binding acts of international organisations do not feature directly in the classic statement of sources of international law found in Article 38(1) of the Statute of the International Court of Justice,[2] they represent an increasingly important part of States' international obligations and frequently require implementation within their internal legal systems. Moving beyond the scheme of Article 38(1), this chapter examines the implementation of the legally binding acts of international organisations within the Irish legal system. In contrast to the two preceding chapters, which looked at international agreements and customary international law in a general way, this chapter will examine a specific example of the source in question: resolutions of the United Nations Security Council. The reason for this is that, as well as being of great political importance, of topical interest, and of a much more far-reaching effect than other acts of international organisations, the implementation of Security Council resolutions sheds valuable light on the question under review in this thesis, namely, the effect of the EU on the implementation of international law within the Irish legal system.

The chapter adopts a similar structure to preceding chapters. In the first substantive section, after briefly reflecting on the acts of international organisations in general terms, the legal framework governing UN Security Council resolutions is

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[1] See generally Alvarez, *International Organizations as Law-Makers* (Oxford University Press, 2006). For general studies of the law governing international organisations, see Sands and Klein, *Bowett's Law of International Institutions* (6th ed, Sweet & Maxwell, 2009) and Klabbers, *An Introduction to International Institutional Law* (2nd ed, Cambridge University Press, 2009).

[2] Of course, the acts of international organisations may be considered to come within Article 38(1) indirectly, as they derive their force from the organisations' constituent treaties. It is arguably in this omission that Article 38(1) most clearly shows its age and, some might say, inadequacy: see generally Pellet, "Article 38" in Zimmermann, Oellers-Frahm and Tomuschat eds, *Statute of the International Court of Justice: A Commentary* (Oxford University Press, 2006).

examined. The traditional approach to implementation of UN Security Council resolutions in the Irish legal system is then analysed. This is followed by a study of the increasingly central role of the European Union in that process. Finally, the conclusion seeks to draw out the implications of the EU's role on the implementation of UN Security Council resolutions within the Irish legal system.

II. ACTS OF INTERNATIONAL ORGANISATIONS: THE CASE OF UNITED NATIONS SECURITY COUNCIL RESOLUTIONS

International organisations, both regional and global in scope, have influenced the development of modern international law in a number of diverse ways. It is within the framework of international organisations that multilateral agreements are generally negotiated and adopted. The conduct and statements of States within these organisations are also among the most valuable and readily available sources for the identification of customary international law. International judicial decisions, an important subsidiary means of determining the law which will be examined in detail in Chapter 6, generally emanate from courts or tribunals established within international organisations. However, international organisations also contribute to international law more directly: their constituent treaties frequently give the organs established thereunder the power to make decisions or, in more limited cases, to make laws which bind the organisations' member states.

The European Union is the most highly-developed example of this phenomenon. While their origins in international law are sometimes neglected,[3] the European Treaties establish permanent political and judicial institutions with the power to make law and take decisions in fields coming within the scope of the Treaties, many of which take direct effect within the legal systems of Member States and prevail over any inconsistent domestic law.[4] These special characteristics allowed the EU to define itself in opposition to, and as autonomous from, international law and to lay emphasis on the constitutional character of the European Treaties. EU law, and its implementation within Member States such as Ireland, has

[3] See e.g. Pellet, "Les fondements juridiques internationaux du droit communautaire" in *Collected Courses of the Academy of European Law* (Vol. V, Book 2, 1994) and Hartley, "International Law and the Law of the European Union – A Reassessment" (2002) 72 *British YBIL* 1.
[4] For an up-to-date review, see Chalmers, Davies and Monti, *European Union Law* (2nd ed, Cambridge University Press, 2010), Chapters 2 to 7.

already been the subject of extensive examination.[5] While implementation of EU law generally within Member States' legal systems sometimes raises analogous issues to those raised by the implementation of international law,[6] its special characteristics render the applicable principles distinct from those governing the implementation of the acts of other international organisations. With the exception of the EU's 'external law', therefore, the implementation of EU law within the Irish legal system is beyond the scope of this study.

Beyond the EU, many international organisations, whether regional or global in scope, are empowered to adopt measures which bind their members. Ireland is a member of a large number of these international organisations.[7] The EU is also a member of a number of international organisations in its own right and is a participant in many others.[8] As Boyle and Chinkin observe, some organisations, such as the International Civil Aviation Organization (ICAO), the International Atomic Energy Agency (IAEA) and the International Labour Organization (ILO), have a "long record of law-making".[9] Others, such as the World Trade Organization (WTO), have "ongoing responsibility for negotiation, interpretation and enforcement of law within their specialised field".[10] Many more, while they have very limited

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[5] Chapter 1, Section I.

[6] As examples of such analogues, one need only cite the questions surrounding whether particular provisions of the European Treaties enjoy direct effect and whether and in what circumstances directives may enjoy direct effect: see e.g. Chalmers, Davies and Monti, note 4, Chapter 7. In the Irish context, an important example is the debate over the proper legislative form for the implementation of directives: see e.g. *Meagher v The Minister for Agriculture* [1994] 1 IR 329; *Maher v Minister for Agriculture* [2001] 2 IR 139; *Browne v. Attorney-General* [2003] 3 IR 205; *Kennedy v. Attorney-General* [2007] 2 IR 45.

[7] The most important group of organisations of which Ireland is a member are the UN and its specialized agencies (International Labour Organization; Food and Agriculture Organisation; UNESCO; World Health Organisation; United Nations Industrial Development Organisation; International Monetary Fund; International Civil Aviation Organisation; Universal Postal Union; World Bank Group; International Telecommunications Union; World Meteorological Organisation; International Atomic Energy Agency; Comprehensive Test Ban Treaty Organisation, CTBTO; Organisation for the Prohibition of Chemical Weapons, OPCW; International Maritime Organisation; World Intellectual Property Organisation; and the International Fund for Agricultural Development). Ireland is also a member of the World Trade Organization and the International Organization for Migration. In addition to the EU, it is a member of a wide range of regional organisations such as the Council of Europe, the Organisation for Economic Cooperation and Development, the Organisation for Security and Cooperation in Europe and is an observer at the Western European Union.

[8] The EU is a member of the World Trade Organization, the Food and Agriculture Organisation and the European Bank for Reconstruction and Development. Although it is ineligible to become a member of the UN and many of its specialized agencies, it generally enjoys permanent observer status within such organisations. In relation to the recent efforts to improve the status of the EU at the UN General Assembly and to enhance representation in other organisations such as the International Financial Institutions, see Emerson and Wouters, "The EU's Diplomatic Debacle at the UN: What else and what next?" *Centre for European Policy Studies Commentary* (1 October 2010), available online at http://www.ceps.eu/book/eu's-diplomatic-debacle-un-what-else-and-what-next (last accessed 24 October 2010).

[9] Boyle and Chinkin, *The Making of International Law* (Oxford University Press, 2007), at 124-125.

[10] *Ibid.*

formal law-making or decision-making capacity, engage in a significant amount of international standard-setting, an extremely important source of regulation in many spheres of activity.[11]

The United Nations, on account of the broad scope of its activities and its quasi-universal membership, enjoys a unique legitimacy among international organisations. Neither of its principal political organs, the General Assembly or the Security Council, is granted a general legislative power under the Charter of the United Nations. The General Assembly, in which each Member State has one vote,[12] is primarily a forum for discussion on matters coming within the scope of the Charter. With the exception of matters being considered by the Security Council,[13] the Assembly may also make recommendations to Member States and/or the Security Council.[14] While "its ability to adopt resolutions on any subject, convene law-making conferences, adopt treaties and initiate codification projects has given it a central role in the development of international law",[15] its power to take decisions binding on States is limited. Its main decision-making function is confined to the budget of the UN and its specialised agencies.[16]

In contrast, the Security Council, which consists of five permanent members and ten elected members, is conferred with the "primary responsibility for the maintenance of international peace and security".[17] To this end, the Council may not only make recommendations but also binding decisions.[18] Where the Council determines there to exist a threat to the peace, a breach of the peace or an act of aggression, Chapter VII of the Charter gives it the power to impose non-forcible and forcible measures to give effect to its decisions. By virtue of Article 25 of the Charter, Members agree to accept and carry out these decisions. Because consensus among the five permanent members is required for decisions on all but procedural matters,[19] these important powers were used only to a limited extent during the Cold War era. However, since the end of the Cold War, "the Security Council has largely been freed from the use of the veto power that had previously inhibited it".[20] Over

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[11] *Ibid.*
[12] Article 9, United Nations Charter.
[13] Article 12, United Nations Charter.
[14] Article 10, United Nations Charter.
[15] Boyle and Chinkin, note 9, at 116.
[16] Article 17, United Nations Charter.
[17] Article 24(1), UN United Nations Charter.
[18] Chapter VI and Chapter VII, United Nations Charter. On the distinction between binding and non-binding provisions of UN Security Council resolutions, see Boyle and Chinkin, note 9, at 229-230.
[19] Article 27, United Nations Charter.
[20] Boyle and Chinkin, note 9, at 109.

the past twenty years, the Council has made extensive use of its decision-making power. Many of these decisions have had significant effects within the internal legal systems of Member States. The focus of this chapter is on this category of act of an international organisation: resolutions adopted by the Security Council under Chapter VII of the Charter. More specifically, while the Security Council has on a number of occasions authorised the use of military force, the focus of its activity has been the use of non-forcible measures or sanctions under Article 41.

Prior to 1990, the Council imposed mandatory sanctions in only two cases, against the white minority regime in Rhodesia in the 1960s and 1970s and against the apartheid regime in South Africa in the 1970s and 1980s. Since then, the array of circumstances in which, and the range of actors against which, the Security Council has imposed sanctions has expanded dramatically.[21] Initially, in the cases of Iraq following its invasion of Kuwait, the former Yugoslavia after its violent break-up, and Haiti in the wake of the military coup in 1991, the Council imposed quasi-comprehensive sanctions, "covering the gamut of economic, financial, diplomatic and other measures".[22] However, in later cases such as Somalia, Liberia, Sierra Leone, Ethiopia and Eritrea, and the Democratic Republic of the Congo, the Council adopted more restricted sanctions confined to arms, oil or travel embargoes.[23] In the case of the Angolan independence movement, UNITA, the Council's sanctions – which included arms and oil embargoes as well as restrictions on travel and the import of rough diamonds – were targeted specifically not against the State but against that non-State movement and its members.[24] Similar measures have been adopted in other recent sanctions regimes[25] along with, in the cases of the Democratic People's Republic of Korea and Iran, arms embargoes and embargoes on proliferation-sensitive nuclear and ballistic missile programmes.[26]

In the cases of the former Yugoslavia and Rwanda, the Council also drew upon novel measures with the establishment of international criminal tribunals for the prosecution of persons responsible for serious violations of international

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[21] For an excellent overview up to 2004, see Gowlland-Debbas, "Sanctions Regimes under Article 41 of the UN Charter" in Gowlland-Debbas ed, *National Implementation of United Nations Sanctions: A Comparative Study* (Brill, 2004).
[22] Gowlland-Debbas, note 21, at 8.
[23] Gowlland-Debbas, note 21, at 11-14.
[24] Gowlland-Debbas, note 21, at 12.
[25] See e.g. Security Council resolutions 1533 (Democratic Republic of the Congo), 1572 (Côte d'Ivoire) and 1591 (Sudan).
[26] Security Council resolutions 1718 (DPRK) and 1737 (Iran).

humanitarian law.[27] Furthermore, in response to the association of Libya, Sudan, and the Taliban administration in Afghanistan with terrorist activities, the Council acted by, among other measures, freezing the assets of those governments.[28] In the context of the 'war on terrorism', the Council drew on and further developed these measures, in particular by imposing 'smart sanctions' against designated entities and individuals, such as Usama bin Laden, Al-Qaida and the Taliban, rather than against governmental entities.[29]

As well as leading to the intensification of these sanctions against alleged terrorist entities, the attacks of September 11th, 2001 also resulted in the Security Council imposing onerous obligations on *all* Member States to take certain steps within their legal systems in the fight against terrorism. Resolution 1373 on the prevention and suppression of the financing of terrorist acts placed obligations on Member States, *inter alia*, to criminalise terrorism and the financing for terrorism, to freeze the funds of those engaged in such activity, to bring any such persons to justice and to ratify a series of counter-terrorism conventions. Thus, the Council embarked upon its 'legislative' phase, raising serious questions about the limits and legitimacy of the Security Council's action under the Charter.[30] These questions are all the more important because, unlike the General Assembly, not all Member States are members of the Security Council and, even among those States represented, they do not all enjoy equal status on account of the privileged position of the veto-wielding permanent five members. For example, Ireland has been a member of the Security Council on only three occasions.[31] Although the European Union enjoys no formal representation on the Council, Article 34(2) TEU places certain obligations on Member States which are members of the Council to keep the EU informed and to defend its positions and interests.[32] Nevertheless, the decisions of the Security Council taken under Chapter VII of the Charter bind all Member States.

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[27] Gowlland-Debbas, note 21, at 10 and 13.

[28] Gowlland-Debbas, note 21, at 14-15.

[29] See Security Council resolutions 1267 and subsequent resolutions. As Gowlland-Debbas comments, "it is evident that the general "war on terrorism" has placed tremendous pressures on the UN Charter regime of international protection of the individual....": Gowlland-Debbas, "Concluding Remarks" in Gowlland-Debbas, note 21, at 654.

[30] See e.g. Szasz, "The Security Council Starts Legislating" (2002) 96 *AJIL* 901; Alvarez, "Hegemonic Federalism Revisited" (2003) 97 *AJIL* 873; Talmon, "The Security Council as World Legislature" (2005) 99 *AJIL* 175. See also Happold, "Security Council Resolution 1373 and the United Nations Constitution" (2003) 16 *Leiden JIL* 593.

[31] Ireland was a member in 1962, 1981-2, and 2001-2: see http://www.dfa.ie/home/index.aspx?id=81396 (last accessed 23 October 2010).

[32] Article 34(2) provides that Member States which are members of the Council "will concert and keep the other Member States and the High Representative fully informed", "will, in the execution of their functions, defend the positions and the interests of the Union, without prejudice to their

As the activity of the Security Council has expanded and its sanctions have become more intrusive, the necessity for prompt and effective implementation within Member States' legal systems has also increased.[33] Security Council monitoring of national implementation of sanctions, through its Sanctions Committees, has become a more and more prominent feature of its sanctions regimes. As Gowlland-Debbas has commented, "[t]he decisions and practice of the Security Council, while political in origin, have served to change the legal position of States and also, recently, of individuals, engendering far-reaching legal consequences" and this has resulted in "an interesting evolution in the manner in which international law is being imported into domestic legal systems".[34] In recent years, no other form of international obligation has raised questions about the implementation of international law into internal legal systems as starkly as UN Security Council resolutions.

At the international level, Article 103 of the UN Charter provides that, "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement", Members' obligations under the present Charter "shall prevail". However, this provision does not determine the effects of the Charter or decisions taken by the organs established by the Charter within internal legal orders. As Abraham comments,

> It flows from this that the effects are determined, for each domestic legal order, by the domestic law of the state in question, i.e. by the mode of interaction of international norms with norms of internal origin set out by the national constitutional order as well as the legal status conferred in the legal order on treaties and on the secondary law of international organizations by the relevant internal texts and by the jurisprudence of national courts. It is therefore necessary to turn to the internal law of each State, in particular to its Constitution and the jurisprudence of its superior courts.[35]

Indeed, the European Court of Justice recently addressed this very issue in its judgment in the leading case of *Kadi*:

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responsibilities under the provisions of the United Nations Charter" and, when the Union has defined a position on a subject on the Council agenda, those Member States "shall request that the High Representative be invited to present the Union's position".

[33] Gowlland-Debbas, note 29, at 644.

[34] Gowlland-Debbas, note 29, at 645. See also Boyle and Chinkin, note 9, at 230-233.

[35] Abraham, "L'applicabilité du droit de la Charte dans les ordres juridiques internes: le cas français" in Cot, Pellet et Forteau eds, *La Charte des Nations Unies: Commentaire article par article* (3rd ed, Economica, 2005), at 69 (author's translation).

> It must however be noted that the Charter of the United Nations does not impose the choice of a particular model for the implementation of resolutions adopted by the Security Council under Chapter VII of the Charter, since they are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations. The Charter of the United Nations leaves the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order.[36]

As this chapter will describe in due course, the Member States of the UN have increasingly chosen to act through the EU in its implementation of Security Council resolutions into their domestic legal orders. As a result, in the case of EU Member States such as Ireland, it is necessary to look not alone to the Member State's internal legal system but also the EU legal system itself.

III. IMPLEMENTATION WITHIN THE IRISH LEGAL SYSTEM

A. The Framework for Implementing Obligations under the United Nations Charter in the Irish Legal System

The 1937 Constitution, which predates the creation of the Organisation, contains no reference to the United Nations. Like most constitutions of EU Member States,[37] it also does not regulate the status of the acts or decisions of international organisations, such as the UN, within the Irish legal system. In order to understand the implementation of UN Security Council resolutions in the Irish legal system, it is necessary to examine the status of the UN Charter, from which those resolutions derive their authority. As with other international agreements, the status of the

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[36] Joined Cases C-402/05P and C-415/05P *Kadi and Al Barakaat* [2008] ECR I-6351, at para. 298 (hereinafter *Kadi*). But see the critical analysis of Pavoni, "Freedom to Choose the Legal Means for Implementing UN Security Council Resolutions and the ECJ *Kadi* Judgment: A Misplaced Argument Hindering the Enforcement of International Law in the EC" in Cremona, Francioni and Poli eds, *Challenging the EU Counter-Terrorism Measures through the Courts* (Academy of European Law, 2010), at 31-38.

[37] "Most of the constitutions of the EU Member States are simply silent, or at best vague, concerning the legal effect of decisions of international organizations": Lavranos, *Legal Interaction between Decisions of International Organizations and European Law* (Europa, 2004), at 4. An exception is the Portuguese Constitution of 1976, Article 8(2) of which provides "[r]ules provided for in international conventions duly ratified or approved, following their official publication, apply in municipal law as long as they remain internationally binding with respect to the Portuguese State".

Charter is governed by Article 29.6 of the 1937 Constitution. Put simply, in the absence of any implementing legislation, the Charter does not form part of Irish law.

When Ireland joined the UN in December 1955,[38] it did so on the basis of a motion of Dáil Eireann of 25th July 1946 recommending the Government "to take steps with a view to Ireland's admission to membership of the United Nations Organization as soon as they consider it opportune to do so".[39] At the time of Ireland's eventual entry into the UN in 1955, Eamon de Valera, who as Taoiseach had introduced the motion in 1946 but in 1955 was opposition leader, queried whether legislation was necessary to give effect to the Charter within Irish law.[40] However, the Taoiseach, John A. Costello, stated that successive Governments had made it clear that Ireland's original application to join the UN in 1946 on foot of the Dáil motion continued to stand. This formed the basis for its admission to the UN, and no legislation was required.[41]

Thus, in contrast to the United Kingdom[42] and the United States[43] among others,[44] and indeed Ireland's own practice in relation to the League of Nations,[45] no implementing legislation was enacted by which the State could give effect to its obligations under the Charter. While clearly binding on the State as a matter of international law, in light of Article 29.6, the Charter forms no part of Irish law nor is there any general legislation in place enabling the Government to give effect to mandatory decisions of the Security Council within the Irish legal order. It follows that, in the absence of any implementing measures, resolutions of the Security Council binding on the State by virtue of Article 25 of the Charter also form no part of Irish law.

As discussed in Chapter 2, in the wake of the decision of the Supreme Court in *Crotty v. An Taoiseach*,[46] questions were raised as to the constitutionality of the

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[38] See General Assembly resolution 995 (X) (14 December 1955).
[39] 102 Dáil Debates 1481 (25 July, 1946)
[40] 153 Dáil Debates 1603 (15 December, 1955)
[41] 153 Dáil Debates 1603 (15 December, 1955).
[42] United Nations Act 1946. See Bridge, "The United Nations and English Law" (1969) 18 *ICLQ* 689.
[43] United Nations Participation Act 1945.
[44] See e.g. Australia's Charter of the United Nations Act 1945 and New Zealand's United Nations Act 1946. As Gowlland-Debbas observes, "only a handful of States adopted permanent enabling legislation expressly authorizing the executive branch to implement future mandatory decisions of the Security Council under Article 41 of the Charter by decree.... The majority of States did not consider such legislation to constitute automatic accompaniment to membership in the United Nations, not even those who acceded much later, such as Finland and Jordan, both of which joined in 1955": Gowlland-Debbas, "Implementing Sanctions Resolutions in Domestic Law" in note 21, at 42.
[45] League of Nations (Guarantee) Act 1923; League of Nations (Obligations of Membership) Act 1935.
[46] *Crotty v. An Taoiseach* [1987] IR 713.

State's membership of the UN in light of the power of the Security Council to take decisions which, in accordance with Article 25 of the Charter, were binding on Member States.[47] It was within this context that the Report of the Constitution Review Group recommended inclusion of an express reference to the United Nations in the Constitution, which "would have symbolic value and would remove any uncertainty concerning the validity of our membership of the United Nations".[48] However, when the matter came before the All-Party Committee on the Constitution, the Committee rejected this recommendation, expressing the view that such an amendment was "legally unnecessary having regard to the strong provisions of Article 29.1 and 29.2" and that it "could create legal ambiguity where none exists over the past membership of the UN or other organizations".[49] Despite the concerns raised by *Crotty*, there has never been any challenge to the constitutionality of the State's membership of the UN.

B. Implementation of UN Security Council Resolutions: Legislative and Executive Practice

The paucity of binding decisions taken by the Security Council during the Cold War era meant that the lack of any general implementing mechanism posed few problems in practice. In the period to 1990, Ireland gave effect to the two cases of mandatory sanctions imposed by the Security Council by way of *ad hoc* measures adopted under existing legislation.

In the case of Rhodesia, following the Unilateral Declaration of Independence by the white minority regime in November 1965, the Security Council adopted a series of resolutions calling on Member States not to recognise the regime and to refrain from giving any assistance to Rhodesia.[50] After recommending sanctions in November 1965[51] and imposing an oil embargo in April 1966,[52] the Council, expressly acting under Chapter VII, imposed mandatory economic

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[47] See Chapter 2, Section II.F.
[48] Report of the Constitution Review Group, Article 29. The suggested draft provision was in the following terms: "Ireland, as a member of the United Nations, confirms its determination to comply with its obligations under the Charter of the United Nations."
[49] All-Party Committee on the Constitution, *Eighth Progress Report: Government* (Government Publications Office, 2003), at 32.
[50] Security Council resolutions 216 and 217 (1965) and 277 (1970).
[51] Security Council resolutions 216 and 217 (1965).
[52] Security Council resolution 216 (1966).

sanctions for the first time in December 1966.[53] Security Council resolution 232 required Member States to prevent the import into their territories or shipment of certain listed commodities from Southern Rhodesia, the promotion of export of those commodities from Southern Rhodesia by their nationals, and the export of arms and certain other goods to Southern Rhodesia.[54] The resolution also called on Member States "not to render financial or other economic aid to the illegal racist regime in Southern Rhodesia". The resolution reminded "Member States that the failure or refusal by any of them to implement the present resolution shall constitute a violation of Article 25 of the United Nations Charter"[55] and expressly called on all Member States to carry out the Council's decision in accordance with that provision.[56] With a view to monitoring the implementation of its decision, the Council provided for Member States to report the measures they had taken to give effect to the sanctions to the Secretary-General who would in turn report to the Council on the progress of implementation.[57] These sanctions, which were extended in later years to include further economic and diplomatic restrictions,[58] were only terminated in 1979 when the white minority regime fell from power and the state of Zimbabwe was on the verge of its creation.[59]

In order to give effect to these measures within the Irish legal system, a range of measures were required. First, the Government made an order under the Aliens Act, placing "controls on the entry into Ireland of persons bearing passports issued by the illegal regime and certain other persons".[60] Secondly, it took measures under import[61] and export[62] control legislation to give effect to the restrictions on trade to

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[53] Security Council resolution 232 (1966).
[54] Operative paragraph 2, Security Council resolution 232 (1966).
[55] Operative paragraph 3, Security Council resolution 232 (1966).
[56] Operative paragraph 6, Security Council resolution 232 (1966).
[57] Operative paragraphs 8 and 9, Security Council resolution 232 (1966).
[58] Security Council resolutions 253 (1968), 277 (1970), 333 (1973) and 388 (1976).
[59] Security Council resolutions 460 (1979).
[60] S.I. No. 12/1966: Aliens (Amendment) Order, 1966.
[61] S.I. No. 10/1966: Restriction of Imports (Goods From Southern Rhodesia) Order, 1966, which prohibited the "importation of any goods manufactured or produced in or consigned from Southern Rhodesia, save under and in accordance with a licence issued by the Minister for Industry and Commerce".
[62] S.I. No. 40/1967: Control of Exports (Southern Rhodesia) Order, 1967, which prohibited the export of arms, ammunition, aircraft, motor vehicles, plant, machinery, component parts and materials for the manufacture, assembly or maintenance of arms, ammunition, aircraft or motor vehicles, mineral oils and natural gases, and hydrocarbons derived wholly or mainly therefrom or from coal, bituminous shale or other mineral, but excluding pharmaceutical products, insecticides and pesticide. For subsequent years, see the orders of the same name: S.I. No. 48/1968; S.I. No. 106/1969; S.I. No. 140/1970; S.I. No. 192/1971; S.I. No. 153/1972; S.I. No. 162/1973; S.I. No. 181/1974; S.I. No. 122/1975; S.I. No. 123/1976; S.I. No. 170/1977; S.I. No. 164/1978; S.I. No. 213/1979. See also S.I. No. 105/1969: Agricultural and Fishery Products (Regulation of Export To Southern Rhodesia) Order, 1969 (applying to agricultural and fishery products). Upon the termination of the sanctions, the orders

and from Southern Rhodesia. Measures were also taken to control the exchange of currency.[63] Notably, it was the Government, and not the Oireachtas, which took the necessary measures to give effect to the sanctions. Under the immigration, import and export control legislation, Ministerial orders had to be laid before the Houses of the Oireachtas which were empowered to pass a resolution within 21 days annulling the order, in other words, a negative resolution procedure. Reflecting the Government's control of the Oireachtas and the broad cross-party support for the UN sanctions in question, no such resolution was ever passed. In practice, therefore, there was no parliamentary involvement in the implementation of sanctions.

In the case of mandatory arms embargo imposed against South Africa in 1977,[64] which followed the voluntary arms embargo which had been in place since 1963,[65] the Security Council decided, *inter alia*, that "all States shall cease forthwith any provision to South Africa of arms and related *matériel* of all types, including the sale or transfer of weapons and ammunition, military vehicles and equipment, paramilitary police equipment, and spare parts for the aforementioned, and shall cease as well the provision of all types of equipment and supplies and grants of licensing arrangements for the manufacture or maintenance of the aforementioned".[66] To give effect to this decision, the Government relied on the existing measures which prohibited the export without licence of arms, ammunition and related material under the control of exports legislation.[67] According to a statement by the then Minister of Foreign Affairs to Dáil Éireann in 1985, Ireland "strictly enforce[d] its international legal obligations .... established under Security Council Resolution 418 (1977)":

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then in force were revoked: S.I. No. 24/1980: Control of Exports (Southern Rhodesia) (Revocation) Order, 1980; S.I. No. 70/1980: Agricultural and Fishery Products (Regulation of Export To Southern Rhodesia) (Revocation) Order, 1980; S.I. No. 69/1980: Agricultural and Fishery Products (Regulation of Export To Southern Rhodesia) (Revocation) (No. 2) Order, 1980.

[63] S.I. No. 230/1965: Exchange Control (No. 3) Regulations, 1965 and similar regulations in subsequent years; S.I. No. 271/1965: Customs-Free Airport (Extension of Laws) (No. 4) Regulations, 1965.

[64] Security Council resolutions 418 (1977) and 558 (1984).

[65] See the Preamble of the Resolution 418 (1977), "recalling its resolution 181 (1953) of 7 August 1963 and other resolutions concerning a voluntary arms embargo against South Africa".

[66] Resolution 418 (1977), operative para. 2.

[67] See Schedule II of the annual control of export orders e.g. S.I. No. 195/1977; S.I. No. 369/1978; S.I. No. 403/1979; S.I. No. 385/1980; S.I. No. 415/1981; S.I. No. 387/1982; S.I. No. 405/1983; S.I. No. 286/1984. See the parliamentary question inquiring about the legislation giving effect to resolution 418 (1977) and the Government's response that no additional legislation was required: 328 Dáil Debates 459 (31 March 1981).

No arms or related material can be exported from Ireland to South Africa and the Government uses its licensing power to ensure that nothing is exported to South Africa which might be considered as suitable for military application.[68]

Despite extensive calls for further sanctions against South Africa in the Oireachtas,[69] and the controversy over matters such as the Irish rugby tour of South Africa,[70] the only other measures taken by the Government against South Africa were bans on the import from South Africa of fruit and vegetable and iron and steel products, which were adopted in concert with other members of the then EC outside the framework of the UN.[71] Such measures were a foretaste of greater European cooperation in the implementation of UN sanctions which, by the time the Security Council next imposed mandatory sanctions, had considerably intensified.

In the following section, this evolution of the EU role in the implementation of Security Council resolutions will be examined. For present purposes, it is sufficient to note that, as a result of increased foreign policy cooperation which became subsumed in the Common Foreign Security Policy under the Treaty on European Union, the understanding of the EU in respect to UN sanctions, and as a result EU practice, evolved so as to confer upon the EU a central role in their implementation. The EU now serves as the conduit through which many elements of UN sanctions now enter Member States' legal systems.

Although the EU now plays a central role in implementing economic and certain other sanctions imposed by the Security Council, in some circumstances, national implementing measures are still required. First of all, in order to implement

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[68] 359 Dáil Debates 1253 (12 June, 1985). See also the statement of the Minister for Foreign Affairs to the effect that Ireland had in fact "an embargo on such sales on a voluntary basis since 1963" (364 Dáil Debates 1700 (12 March, 1986).

[69] See e.g. the Seanad motion on Apartheid in South Africa: 113 Seanad Debates 2219 (9 July, 1986).

[70] See the motion of Dáil Éireann deploring the decision of the IRFU to tour South Africa: 328 Dáil Debates 201-230 (24 March, 1981). In *Lennon v. Ganly* [1981] ILRM 84, the High Court (O'Hanlon J.) refused to grant the plaintiffs an interlocutory injunction restraining the IRFU touring party to South Africa "from associating themselves with Ireland by use of the word 'Irish' to describe the party, adorning the shamrock, bearing the tricolour or being present where the Irish National Anthem is played". In his judgment, noting the "widespread international condemnation of the practice of apartheid and racial discrimination" and "[a]ccepting for the purposes of the argument that such practices constitute a breach of a basic norm of international law", O'Hanlon J. did not consider that "the IRFU by maintaining sporting links with South Africa is in breach of international law any more than the Government and State are in breach of international law by permitting trading relations to continue and be maintained with that country".

[71] See S.I. No. 291/1986: Restriction of Imports (Agricultural Produce From South Africa) Order 1986; S.I. No. 124/1987: Restriction of Imports (Iron and Steel Products From The Republic of South Africa) Order, 1987 and the succeeding order, S.I. No. 300/1989. See e.g. the parliamentary statement of the then Minister for Foreign Affairs, Brian Lenihan: "It is Government policy to work, within the Twelve, for the adoption of further common measures with regard to South Africa such as a ban on imports of coal and fruit and vegetables from South Africa. I shall continue to press for actions such as these by the Twelve" (380 Dáil Debates 1066 (11 May, 1988). See also see Bethlehem, "The European Union" in Gowlland-Debbas ed, note 21, at 138ff.

the sanctions fully within the Member States' legal systems, the EU regulations themselves require Member States to adopt domestic enforcement measures, which do not fall within the EU's competence. Thus, following the adoption of a regulation, the Government makes an order under the European Communities Act 1972 (and now the European Union Act 2009), making it an offence to breach the terms of the Regulation and imposing penalties for non-compliance.[72] Other ancillary orders include the designation of national authorities for the purpose of enforcement of the sanctions.[73] Where the resolutions or implementing regulations also require the prohibition of financial transfers, the Government is also empowered to make orders to this effect under the Financial Transfers Act 1992.[74]

Moreover, there are cases where the very nature of the sanctions imposed by the Security Council brings them outside the scope of EU law, in which case each Member State must adopt its own measures to give effect to its obligations. This will sometimes necessitate the enactment of primary legislation. For example, after the Security Council established the the International Criminal Tribunal for the Former Yugoslavia in Resolution 827 (1993) and the International Criminal Tribunal for Rwanda in Resolution 955 (1994), the Oireachtas enacted the International War Crimes Tribunal Act 1998 "to enable Ireland to fulfil its obligations to co-operate with international tribunals in the performance of their functions relating to the prosecution and punishment of international war crimes".[75] To this end, Part II of the Act puts in place a mechanism for the arrest and surrender in Ireland of persons

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[72] To take the sanctions against Sudan as an example, see S.I. No. 131/2004: European Communities (Restrictive Measures) (Sudan) Regulations 2004; S.I. No. 430/2006: European Communities (Sudan) (Financial Sanctions) Regulations 2006; S.I. No. 800/2007: European Communities (Sudan) (Financial Sanctions) Regulations 2007. Similar measures have been taken in respect of the other sanctions regimes.

[73] This has generally been the Central Bank and Financial Services Authority of Ireland: see e.g. section 5, S.I. No. 800/2007: European Communities (Sudan) (Financial Sanctions) Regulations 2007.

[74] Again to take the example of sanctions against Sudan, S.I. No. 899/2005: Financial Transfers (Sudan) (Prohibition) Order 2005; S.I. No. 429/2006: Financial Transfers (Sudan) (Prohibition) Order 2006; S.I. No. 801/2007: Financial Transfers (Sudan) (Prohibition) Order 2007. See generally the Financial Transfers Act 1992.

[75] International War Crimes Tribunals Act, 1998, Long Title. Both resolutions were scheduled to the Act as well as the Statutes of both Tribunals. Paragraph 4 of Resolution 827 (1993) provided that "all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute". Similarly, paragraph 2 of Resolution 955 (1994) provides that " all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 28 of the Statute, and requests States to keep the Secretary-General informed of such measures"

sought by the Tribunals. Part III deals with the possibility of parallel proceedings in Ireland while Part IV provides for other forms of assistance that may be sought by the Tribunals. In Part V, section 35 makes it an offence "to interfere with or intimidate an international tribunal witness" while section 37 gives the Minister the power to make regulations, *inter alia*, "providing for any other matter considered necessary or expedient for giving full effect to this Act".[76]

Similarly, among the obligations imposed by the Security Council resolution 1373, the State had to ratify a number of international conventions and to give effect to their provisions in Irish law.[77] The Criminal Justice (Terrorist Offences) Act 2005 allowed the State to ratify the International Convention Against the Taking of Hostages, the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, the International Convention for the Suppression of Terrorist Bombings and the International Convention for the Suppression of the Financing of Terrorism as well as to give effect to the EU Council's Framework Decision on Terrorism. The latter instrument is an example of the important coordinating role of the EU even in circumstances where it does not directly give effect to the obligations arising under Security Council resolutions.

In addition to legislative measures, the Government may also take administrative measures to give effect to Security Council resolutions. A good example of this is in the case of travel bans, a common feature of many sanctions regimes. Under Irish immigration law, the Government has the power to refuse entry to non-citizens on the grounds of national security and public policy. Persons subject to a travel ban pursuant to a Security Council resolution are placed on a Garda 'watch list' with a view to enforcing this travel ban.[78]

In summary, while UN Security Council resolutions form no part of Irish law in the absence of implementing measures, a wide range of existing and *ad hoc* legislative and executive measures, which reflect the diverse nature of the obligations imposed, have been used to implement those resolutions and, in so doing, to fulfil Ireland's obligation with Article 25 of the UN Charter.

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[76] Section 37(1)(g).

[77] The State also relies on existing legislation to give effect to its obligations in this regard, notably the Offences Against the State Acts 1939 to 1998. See the Irish Report to the Counter-Terrorism Committee e.g. for 2004, S/2004/661, available online at http://www.un.org/en/sc/ctc/resources/1373.html (last accessed on 23 October 2010).

[78] See e.g. the Irish Report to the 1267 Committee (S/AC.37/2004/(1455)/6), available online at http://www.un.org/sc/committees/1267/memstatesreports.shtml (last accessed 23 October 2010).

C. Status of UN Security Council Resolutions

As the preceding sections make clear, UN Security Council resolutions have no independent status within the Irish legal system. This was recognised by Murphy J. in his first instance decision in *Bosphorus v. Minister for Transport*:

> It is, however, common case that the United Nations resolutions do not form part of Irish domestic law and, accordingly, would not of themselves justify the minister in impounding the aircraft.[79]

The status of such resolutions within Irish law depends exclusively on the instrument through which they are given effect. In the cases where independent implementing action continues to be taken within the Irish legal system, resolutions are either given effect through primary or secondary legislation. Although the origins of such legislation may lie in a Security Council resolution, in principle the resolution itself enjoys no special status in Irish law and, like any other piece of legislation, is subject to the Constitution.[80]

In many cases, as indeed in the *Bosphorus* case, the EU now gives effect to many resolutions through regulations which are binding in their entirety and directly applicable in all Member States. By dint of the broad immunity provision in Article 29.4.6°, such regulations, "necessitated by the obligations of membership of the European Union", cannot be invalidated by any provision of the Irish Constitution. In accordance with the doctrine of supremacy, EU regulations prevail over any inconsistent Irish law, including the Constitution. The effect of this position is thus to effectively insulate such resolutions from constitutional challenge under Irish law. As resolutions increasingly trench upon fundamental rights, this makes it all the more important that there is the potential for effective judicial review of implementing measures at the EU level.

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[79] *Bosphorus v. Minister for Transport* [1994] 2 ILRM 551.

[80] See the *obiter* remarks of Macken J. in *Dubsky v. Ireland* [2007] 1 IR 63, at 82: "Fourthly, the fact that the respondents assert that what is being carried on is pursuant to a Security Council Resolution is not at all relevant. If what is being done is an infringement of Article 28.3.1, then the fact that such may be done in purported compliance with a Security Council Resolution does not resolve the constitutionality of the acts in question. Either they are within the terms of the Article or outside it"; [2007] 1 IR 63, at 105: "I accept, however, the argument of the applicant that if a Security Council resolution directed or implied that the State was obliged to embark on a programme which was obviously unconstitutional, the existence of that resolution could not render the programme constitutional."

Security Council resolutions may serve as an aid to the interpretation of implementing legislation. In *Bosphorus*, Murphy J. did just that in interpreting the EU implementing regulation:

> The real significance of the United Nations resolutions insofar as they relate to the present proceedings is that Resolution 820/1993 of the Security Council resolutions provided the genesis for article 8 of the relevant European regulation.[81]

Although that was in the context of an EU regulation, the same principle must apply, by analogy with the position in respect of the other sources of international law, to Irish legislation implementing Security Council resolutions. In *Dubsky v. Ireland*, where an applicant was indirectly relying on a Security Council resolution in support of his claim that the Government decision to allow overflight and refuelling of US planes was unconstitutional, the High Court recognised that it was entitled to consider "the background to Resolution 1368" and "the terms of that Resolution" in assessing whether the situation in Afghanistan constituted a war within the meaning of Article 28.3.1° of the Constitution.[82] However, Macken J. was circumspect about the Court's jurisdiction to interpret the Security Council resolution 1368, stating that it was "neither permissible nor appropriate" for the Court to interpret a Security Council resolution and that the Court had "no competence to do so".[83]

D. Assessment

Security Council resolutions, while binding on the State in international law, have no effect within the Irish legal system unless and until implementing measures are adopted. In short, their legal status mirrors that of international agreements. The traditional Irish practice has been to implement such resolutions through *ad hoc* legislative or, more frequently, executive measures. These executive measures are the subject of minimal parliamentary oversight. While Ireland continues to take domestic measures in order to give full effect to EU implementing measures or to give effect to measures which fall outside the scope of EU competence, the EU increasingly serves as the locus for the coordination and adoption of implementing action. As with all EU measures, regulations implementing Security Council resolutions enjoy a high degree of constitutional immunity in Ireland. As Security

[81] *Bosphorus v. Minister for Transport* [1994] 2 ILRM 551.
[82] *Dubsky v. Ireland* [2007] 1 IR 63, at 89.
[83] *Dubsky v. Ireland* [2007] 1 IR 63, at 105.

Council resolutions have multiplied in their number and become magnified in their effects, the effect of EU membership has come increasingly into focus.

IV. IMPLEMENTATION WITHIN THE EUROPEAN UNION LEGAL SYSTEM

A. Introduction

Although the EU is not and cannot be a member of the United Nations,[84] all EU Member States are members of the organisation and the European Treaties make a number of express references to the United Nations. Most significantly, Article 3.5 TEU provides that the EU shall contribute "to the strict observance and the development of international law, including respect for the principles of the United Nations Charter". The principles of the Charter also guide the EU's international action, which, in accordance with Article 21.1 TEU, "shall promote multilateral solutions to common problems, in particular in the framework of the United Nations". Thus, although the EU is not bound directly by the UN Charter or Security Council resolutions,[85] respect for its principles is entrenched in the European Treaties and, as foreign policy cooperation between Member States has intensified, the EU has come to play a central role in the implementation of UN Security Council resolutions.

B. Implementation of Security Council Resolutions within the European Union: the Evolving Legal Framework

i. Evolution of the European Union's Role

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[84] See Article 4(1), United Nations Charter: "Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations".

[85] Insofar as it has an obligation to act, it is, as Bethelehem describes it, "a derivative *obligation* based on the obligation of individual EU Member States under the *Charter* in respect of UNSC decisions and the transfer of competences in respect of such matters from the Member States to the Community": see Bethlehem, note 71, at 127 (emphasis in original). See also the discussion in Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford University Press, 2004), at 437-439 (noting that the UN Charter "does not appear to bind the EU or the EC on the basis of international law" but suggesting that the Court "might well....be inclined to recognize the binding character of the UN Charter and of Security Council resolutions").

The practice relating to sanctions, which straddle trade policy and foreign policy, reflects the evolution, and the interaction, of these policies.[86] Eeckhout describes the constitutional separation of trade policy and foreign policy as one of the hallmarks of the EU's external relations, "the first always having been at the very core of supranational integration and the second forming the subject of evolving, but still on the whole intergovernmental, cooperation".[87]

Initially, in the case of the sanctions against Rhodesia, the European Community, notwithstanding its competence in the field of trade, did not consider itself competent to implement the relevant Security Council resolutions.[88] As a result, Member States, such as Ireland, took their own national measures in order to implement the sanctions.

However, the placing of European Political Cooperation on a formal treaty footing in Title III of the Single European Act "both established a mechanism within which action by the Member States in implementation of sanctions could be brought within a cooperative framework and created an expectation that Member States would proceed in a coordinated manner on such matters".[89] Indeed, this provided the forum in which Member States decided to adopt sanctions outside the framework of the UN (as in the case of South Africa mentioned in Section III). When the Security Council imposed sanctions against Iraq in 1990, Member States acted through the European Community, as it then was, to give effect to the sanctions imposed by the Security Council "in order to ensure uniform implementation, throughout the Community, of the measures concerning trade with Iraq and Kuwait".[90] In the framework of European Political Cooperation, the Member States by consensus agreed to act through the Community and the Council, under Article 113 EC, and then adopted a regulation giving effect to this decision. A similar approach was adopted in relation to sanctions imposed against the former Yugoslavia. As

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[86] In this section, I have drawn upon the valuable survey of the European Union role in implementation of UN sanctions by Bethlehem, note 71, and the analysis of Eeckhout, note 85, Chapter 12.

[87] Eeckhout, note 85, at 422. See also MacLeod, Hyett and Hendry, *External Relations of the European Communities: A Manual of Law and Practice* (Oxford University Press, 1996), at 352: "it is an area where the policy reason for action falls outside Community competence but the means of achieving that policy include measures falling within Community competence".

[88] In fact, as Bethlehem notes, Rhodesia was included on a list of countries with which trade was to be liberalized: see Bethlehem, note 71, at 128; see also Eeckhout, note 85, at 424 (referring to the "prevailing view ...that economic sanctions were beyond the scope of the common commercial policy").

[89] Bethlehem, note 71, at 141.

[90] Council Regulation (EEC) No 2340/90 of 8 August 1990 preventing trade by the Community as regards Iraq and Kuwait [1990] OJ L 213.

Bethlehem describes it, there was a "growing appreciation that implementation of economic sanctions... [was] properly to be addressed by the Community".[91]

This important change of approach coincided with the reinvigoration of the Security Council's activity as the Cold War came to a close. Amid some uncertainty over the proper legal basis for this practice, the Treaty on European Union put in place a clear structure for the implementation of sanctions. In the first instance, a decision of the Member States under the Common Foreign and Security Policy (the successor to European Political Cooperation which became the EU's second pillar) – either a common position or joint action under Article 14 TEU or Article 15 TEU – was required, providing for action by the Community "to interrupt or to reduce, in part or completely, economic relations with one or more third countries". Where the Member States had taken such a decision, Article 301 EC provided that the Council, acting by a qualified majority on a proposal from the Commission, "shall take the necessary measures". Under Article 60 EC, the Council was also empowered to "take the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned". Thus, action by the Community in the field of sanctions was "fundamentally linked" to action by the EU in the context of the Common Foreign and Security Policy.[92] Articles 301 EC and 60 EC thus provided a passerelle between the first and second pillars, between action by the Union and action by the Community. In taking the necessary measures, the Community acted by way of regulation, an instrument which is "binding in its entirety and directly applicable in all Member States".[93] In short, Member States, acting through the European Union, put in place a uniform regime for implementation of sanctions and conferred the status of EU law on the relevant implementing measures, such that they prevailed over any inconsistent national law.

However, as the scope of Security Council resolutions expanded, questions were raised about the limits of the Community's competence. One such question related to the extension of restrictive measures from "third countries" referred to in Articles 301 EC and 60 EC to non-State actors and individuals such as Usama Bin Laden, Al-Qaida and the Taliban. In *Kadi*,[94] the applicant argued that Articles 301 EC and 60 EC did not provide a sufficient legal basis for the imposition of restrictive measures on individuals, as opposed to third countries and that the Community could

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[91] Bethlehem, note 71, at 141.
[92] Bethlehem, note 71, at 146.
[93] Article 288 TFEU (formerly Article 249 EC).
[94] Joined Cases C-402/05P and C-415/05P *Kadi and Al Barakaat* [2008] ECR I-6351.

not resort to the flexibility provision then embodied in Article 308 EC, in addition to Articles 301 EC and 60 EC, to provide a legal basis for the regulations. Article 308 EC provided that, if action by the Community was necessary to attain, in the course of the operation of common market, "one of the objectives of the Community" and the Treaties had not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, "shall take the necessary measures". The applicant argued that, while the restrictive measures against individuals may have been necessary to attain one of the objectives of the Union in its Common and Foreign Security Policy, they were not necessary to attain "one of the objectives of the Community". Taking a broad view of this term, the Court of Justice rejected the argument, stating that:

> Inasmuch as they provide for Community powers to impose restrictive measures of an economic nature in order to implement actions decided on under the CFSP, Articles 60 EC and 301 EC are the expression of an implicit underlying objective, namely, that of making it possible to adopt such measures through the efficient use of a Community instrument.[95]

The Court held that this implicit underlying objective of the Community justified recourse to Article 308 EC and upheld the legal basis of the regulations, which had been based on Articles 60, 301 and 308 EC, although, as will be discussed below, it found that those regulations violated the applicant's fundamental rights.[96] Amendments to the current Treaties address this issue.

While it has been controversial in some respects and continues to evolve, the EU has come to play a central role in the implementation of Security Council resolutions imposing sanctions. The procedure which has developed reconciles competing interests: "the desire of the Member States to ensure that sanctions were imposed uniformly throughout the Community as quickly as possible while at the same time not encroaching on matters that fell within the competence of the Member States" and "the desire of the Member States to retain control over matters of traditional foreign and security policy with the exclusive competence of the

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[95] *Ibid.*, para.226.

[96] On the question of competence and the possible residual effects of *Kadi* post-Lisbon, see Cremona "EC Competence, 'Smart Sanctions' and the *Kadi* Case" in Cremona, Francioni and Poli eds, note 36, at 71.The approach of the Court of Justice has been sharply criticized: see e.g. Chalmers, Davies and Monti, note 4, at 219 (opining that "it is beyond credulity that freezing the assets of a couple of hundred individuals distorts competition in any significant way in the world's largest economic bloc").

Community in relation to the common commercial policy...".[97] With some amendments, this basic structure for the implementation of sanctions is replicated in the current provisions applicable since the entry into force of the Treaty of Lisbon on 1st December 2009.

ii. Current Legal Basis for Implementation of Security Council Resolutions: the Scope of EU Competence

Although the changes effected by the Treaty of Lisbon have resulted in a single European Union, the Common Foreign and Security Policy under the Treaty on European Union (TEU) and external action under the Treaty on the Functioning of the European Union (TFEU) remain subject to distinct regimes.

Chapter 2 of Title V of the Treaty on European Union contains specific provisions on the Common Foreign and Security Policy. Among these provisions, Article 25 TEU provides that the Union shall conduct the common foreign and security policy, *inter alia,* by "adopting decisions" defining the actions to be undertaken or the positions to be taken by the Union. In accordance with Articles 24 TEU, the Council must act by unanimity in adopting such decisions. Where such a decision "provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries", the stage is set for action under the TFEU.

In Title IV of Part V of the TFEU, Article 215 TFEU, reflecting former Article 301 EC, provides that, where such a decision has been taken within the framework of the CFSP, "the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures". A novel feature of the procedure, which reflects the general reinforcement of the Parliament's role under the Treaty of Lisbon, is that Article 215 TFEU expressly provides that the Council is required to inform the European Parliament of this action. Article 215 TFEU also includes two further changes which are of significance in light of the case-law which developed under the prior system of restrictive measures: paragraph 2 provides that restrictive measures may be taken "against natural or legal persons and groups or non-State entities"; paragraph 3 provides that the acts referred to in Article 215 TFEU "shall include necessary provisions on legal safeguards".

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[97] MacLeod, Hendry and Hyett, note 87, at 352.

In Chapter I of Title V, Article 75 TFEU substantially remodels Article 60 EC, disconnecting it from action under the TEU and Article 215 TFEU (ex Article 301 EC) and placing it within the framework of the objective of "combating terrorism and related activities" in the EU's Area of Freedom, Security and Justice. Where action is necessary to achieve this objective, the European Parliament and the Council, acting by means of regulations under the ordinary legislative procedure, "shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities". Article 75.2 TFEU provides that the Council, acting on a proposal from the Commission, shall adopt measures to implement this framework. Finally, mirroring Article 215.3 TFEU, the acts taken by the Union "shall include necessary provisions on legal safeguards".[98]

Thus, while amended to reflect some of the important issues which had developed in the case-law and in practice, the European Treaties therefore continue to confer a central role upon the EU in the implementation of UN Security Council resolutions imposing economic sanctions. The EU serves as the focal point and conduit for implementation of these sanctions in Member States' legal systems.

However, there are certain limits to the EU's competence. First, as already discussed, it is for Member States to prescribe the penalties for breach of the EU's implementing regulations and to take charge of other ancillary matters. As the Court of Justice indicated in its judgment in *Ebony Maritime*,[99]

> In this connection, it should be noted that the Court has consistently held that where a Community regulation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the EC Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. For that purpose, while the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to

[98] For a commentary on these provisions, see Cremona, note 96. See further the challenge initiated by the Parliament to the Council Regulations implementing the UN sanctions regime against Usama Bin Laden, Al-Qaeda and the Taliban on the basis of Article 215 TFEU (thus requiring that the Parliament is merely informed) rather than on the basis of Article 75 TFEU (where its approval is necessary): Case C-130/10 *Parliament v. Council* (pending).

[99] C-177/95 *Ebony Maritime* [1997] ECR 1997 I-1111.

> infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive ...[100]

Thus, although it is for Member States and not the EU to impose penalties for the breach of the regulations, Member States must nonetheless act within the framework and the limits of EU law.

More generally, where the EU adopts measures with a view to giving effect to UN Security Council resolutions, the residual scope of action of Member States to take unilateral measures to implement those resolutions is extremely limited. Although Member States retain their competence in foreign policy as a general matter, this competence must be exercised in a manner which is consistent with EU law.[101] This is clear from the decision in *Centro-Com*. The Court of Justice, while acknowledging that Member States had indeed "retained their competence in the field of foreign and security policy", held that the powers retained by Member States "must be exercised in a manner consistent with Community law ...".[102] As Lavranos remarks, "by emphasizing the exclusive competence of the EC for external trade, the ECJ reduces to a minimum the residual competence of the EU Member States to adopt their own measures...".[103]

Moreover, as discussed in the previous section, there remain substantive elements of UN Security Council resolutions which fall outside the competence of the EU such as arms embargoes or restrictions on diplomatic, sporting or cultural relations. So too, implementation of measures – such as those necessary to the resolutions establishing the *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda or requiring the ratification of international conventions – fall within Member States' competence. Yet, even in these areas, cooperation within the EU remains an important feature of sanctions implementation.

C. Status of UN Charter and Security Council Resolutions within the EU Legal System

The role of the EU in the implementation of sanctions imposed by Security Council resolutions presents some unusual features. As noted at the outset, the EU is not a member of, and *prima facie* not bound by the Charter of, the United Nations. Yet the

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[100] *Ibid.*, at para. 35.
[101] C-124/95 *Centro-Com* [1997] ECR 1997 I-81.
[102] *Ibid.*, at para.27.
[103] Lavranos, note 37, at 100.

EU expressly affirms its commitment to the UN in its Treaties and plays a central role in the implementation of Security Council resolutions, especially those imposing economic sanctions. In light of these unusual features, it is not surprising to find that the precise legal status of the UN Charter and Security Council resolutions has been the subject of some uncertainty, as illustrated by the leading case of *Kadi*.[104]

In *Kadi*, the Court of First Instance acknowledged that "the Community as such [was] not directly bound by the Charter of the United Nations and that it [was] not therefore required, as an obligation of general public international law, to accept and carry out the decisions of the Security Council in accordance with Article 25 of that Charter".[105] Nevertheless, referring to Articles 297 EC and 307 EC as indicating a desire on the part of Member States to fulfill their Charter obligations, and to the transfer of the necessary powers by the Member States to the EU for the performance of Member States' obligations under the Charter which demonstrated Member States' will to bind the EU by their obligations under the Charter,[106] the Court held that "the Community must be considered to be bound by the obligations under the Charter of the United Nations in the same way as its Member States, by virtue of the Treaty establishing it".[107] Insofar as the Community had assumed powers previously exercised by Member States in areas governed by the Charter, the provisions of the Charter had "the effect of binding the Community".[108] Having regard to the primacy of the Charter under international law, and its binding effect on the European Union, the Court denied its authority to review the regulations – and in effect the resolutions – except by reference to "*jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible".[109]

However, on appeal, the Court of Justice, without directly and definitively defining the status of the Charter and resolutions within the EU legal order, took a far more circumspect approach to its status and effect within the EU legal system. The Court recognised the importance of the obligations deriving from the UN Charter for Member States when they give effect to resolutions adopted under Chapter VII of the Charter through EU law.[110] It attached "special importance" to the fact that, in

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[104] Joined Cases C-402/05P and C-415/05P *Kadi and Al Barakaat* [2008] ECR I-6351.
[105] *Ibid.*, at para. 192.
[106] *Ibid.*, at paras. 191-200.
[107] *Ibid.*, at para. 193.
[108] *Ibid.*, at para. 203.
[109] *Ibid.*, at para. 226.
[110] *Ibid.*, at para. 293.

accordance with Article 24 of the Charter, "the adoption by the Security Council of resolutions under Chapter VII of the Charter constitutes the exercise of the primary responsibility with which that international body is invested for the maintenance of peace and security at the global level".[111] When the object is to implement a Security Council resolution, the Community must "take due account of the terms and objectives of the resolution concerned and of the relevant obligations under the Charter of the United Nations relating to such implementation".[112] However, the Court also emphasised that the Charter did not "impose the choice of a particular model for the implementation of resolutions adopted by the Security Council under Chapter VII of the Charter, since they are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations".[113] Thus, the Charter left "the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order".[114] As a result, it was not a consequence of the relevant rule of international law that review of the internal lawfulness of an implementing measure in light of fundamental rights was "excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations".[115]

The Court situated its competence in this regard firmly within the framework of the Treaties, noting that the power to give effect to such resolutions, provided for in Articles 60 EC and 301 EC, could only be exercised where the Member States had adopted a decision to this effect under the CFSP, which obliged the Community to take the necessary measures. In response to the argument based on the alleged immunity of the implementing regulation from review on the basis of the primacy of the Security Council resolution to which it was designed to give effect, the Court said that this claim could find no basis "in the place that obligations under the Charter of the United Nations would occupy in the hierarchy of norms within the Community legal order if those obligations were to be classified in that hierarchy".[116] The Court thus queried whether the Charter, and obligations arising thereunder, formed any part of EU law and addressed the status of these obligations in EU law as a hypothetical question. Noting that international agreements concluded by the

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[111] *Ibid.*, at para. 294.
[112] *Ibid.*, at para. 296.
[113] *Ibid.*, at para. 298. On this point, see Pavoni, note 36.
[114] *Ibid.*
[115] *Ibid.*, at para. 299.
[116] *Ibid.*, at para. 305.

Community were binding on its institutions and Member States in accordance with Article 300(7) EC, the Court observed that, *even if* that provision was applicable to the Charter, it would give the Charter primacy over secondary EU law only, not primary EU law including the fundamental rights protected as general principles of EU law.[117] While not definitively holding that the UN Charter did not form part of EU law, the Court was uncharacteristically cautious about its status. When combined with its strong emphasis on the framework provided for by the Treaties, the conclusion must be as follows: in the case of the Charter, while its importance is acknowledged, it enjoys no direct status within the EU legal system;[118] in the case of Security Council resolutions, similarly and as is also the case in the Irish legal system, their status depends upon the measures – normally regulations which are directly applicable, binding on Member States and prevail over any inconsistent national law – by which they are implemented within the EU legal system. However, the regulations must conform to the primary law of the EU, which includes not alone the Treaties but also the general principles of EU law, including fundamental rights.[119] It is this issue – the reviewability of resolution-implementing regulations by reference to fundamental rights – which is at the heart of the Court's decision in the *Kadi* case and which will be examined in the next section.

D. Judicial Review of UN Security Council Resolutions and the Protection of Fundamental Rights

Sanctions, by their nature, invariably impact upon the rights of individuals whose commercial transactions, travel plans or use of assets are affected. With the rise of smart sanctions, the scope for conflict between sanctions and fundamental rights has intensified. This section will examine the two leading cases which address the difficult issues to which this conflict gives rise.

In *Bosphorus*,[120] the plaintiff was a Turkish company which had taken dry leases of two airplanes from Yugoslav Airlines (JAT) for a period of 48 months, during which time it had complete control of the planes, which were staffed by its cabin and flight crew and which were used exclusively for the purposes of travel

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[117] *Ibid.*, at para. 306 *et seq.*

[118] *Ibid.*, at para. 225: (The Court was bound to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations).

[119] Presumably, they must also comply with customary international law insofar as the Court is willing to give effect to customary rules: see generally Chapter 4, Section IV.

[120] *Bosphorus v. Minister for Transport* [1994] 2 ILRM 551.

between Turkey and the EU and Switzerland. The registration certificate for the planes with the Turkish Ministry of Transport named JAT as the owner and Bosphorus as the operator and, under Turkish law, this was conclusive evidence that the planes were under the control of Bosphorus. After one of the planes had been delivered to Dublin for overhaul and maintenance services in April 1993, security clearance for the plane on its release was delayed on the basis of an instruction from the Irish Government that the plane was subject to Article 9 of Council Regulation No. 990/93/EEC. This Regulation, which gave effect to UN Security Council resolution 820, strengthened an existing trade and transport embargo against the Federal Republic of Yugoslavia (Serbia and Montenegro), with Article 9 providing for detention of vessels suspected of violating the Regulation by Member States' competent authorities. In June 1993, the Minister, in line with the view of the sanctions committeee, directed that the plane should be impounded. The plaintiff challenged this decision in the High Court where Murphy J. found that the Regulation did not apply to the plane.[121]

However, following appeal to the Supreme Court which made a preliminary reference to Luxembourg, the European Court of Justice determined that the Regulation did indeed apply to the airplane in question.[122] Bosphorus also argued that the interpretation of the Regulation in such a way as to apply to its aircraft would constitute an infringement of its fundamental right to property and to carry on a business activity. The Court, while recognising that sanctions by their nature had consequences which affected the right to property and the freedom of trade, stated that these rights were not absolute and the Court must determine whether the restrictions imposed by the sanctions were proportionate.[123] Moreover, "the importance of the aims pursued by the regulation at issue [was] such as to justify negative consequences, even of a substantial nature, for some operator".[124] According to the Court, the sanctions pursued an objective of general interest that was so fundamental for the international community – seeking to put an end to the state of war and the massive violations of human rights and humanitarian law in the Balkans region – that the impounding of the aircraft could not be regarded as inappropriate or disproportionate.[125] On this basis, the Regulation in question did not infringe the applicant's fundamental rights. After pursuing further action in the Irish

[121] *Bosphorus v. Minister for Transport* [1994] 2 ILRM 551.
[122] C-84/95 *Bosphorus v. Minister for Transport* [1996] ECR 1996 I-3953, at paras. 12-18.
[123] *Ibid.*, at para. 21.
[124] *Ibid.*, at para. 23.
[125] *Ibid.*, at para. 26.

courts,[126] Bosphorus applied to the European Court of Human Rights, claiming that the impounding of the aircraft constituted a violation of its rights under Article 1 of Protocol 1, the right to property.[127] In an important decision of the Grand Chamber delivered on 30 June 2005, the Court, after reviewing the system for the protection of fundamental rights within the European Union, came to the following conclusion.

> In such circumstances, the Court finds that the protection of fundamental rights by Community law can be considered to be, and to have been at the relevant time, "equivalent" to that of the Convention system. Consequently, the presumption arises that Ireland did not depart from the requirements of the Convention when it implemented legal obligations flowing from its membership of the EC.[128]

On this basis, the Court rejected the applicant's claim:

> The Court has had regard to the nature of the interference, to the general interest pursued by the impoundment and by the sanctions regime and to the ruling of the ECJ (in the light of the opinion of the Advocate General), a ruling with which the Supreme Court was obliged to and did comply. It considers it clear that there was no dysfunction of the mechanisms of control of the observance of Convention rights.[129]

In the Court's view, therefore, it could not be said that the protection of the applicant company's Convention rights was manifestly deficient, with the consequence that the relevant presumption of Convention compliance by the respondent State had not been rebutted.[130] Thus, the Court showed a high degree of deference to the system of fundamental rights protection within the EU. As Costello has commented, the Court's approach "potentially facilitates a deep and specific enquiry into the level of fundamental rights protection afforded by the EU and the ECJ in individual cases, whilst still apparently accommodating the autonomy of the EU legal order".[131]

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[126] *Bosphorus v. Minister for Transport* [1997] 2 IR 1.
[127] *Bosphorus v. Ireland* (2006) 42 EHRR 1.
[128] *Ibid.*, at para. 165.
[129] *Ibid.*, at para. 166.
[130] *Ibid.*, at para. 167.
[131] Costello, "The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe" (2006) 6 *HRLR* 87, at 130. Chalmers, Davies and Monti speak of a "'non-aggression pact between the two European courts, whereby the Court of Justice will slavishly follow the case law of the European Court of Human Rights, whereas the latter will intervene only in cases of the most grotesque dysfunction": Chalmers, Davies and Monti, note 4, at 261. More generally, the decision has generated a significant amount of literature: see e.g. Douglas-Scott, "A Tale of Two Courts: Luxembourg, Strasbourg and the Growing. European Human Rights *Acquis*" (2006) 43 *CMLR* 629; Peers, "Bosphorus - European Court of Human Rights" (2006) 2 *EuConst* 443; Lock, "Beyond *Bosphorus*: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights"

However, as Costello and others have also observed, much depends on the manner in which the test of 'equivalent protection' is applied in practice.[132] Moreover, the EU's proposed accession to the ECHR, now provided for in Article 6(2) TEU and for which negotiations are underway, will formalise the relationship between the EU and the ECtHR and thereby change, at least to some extent, the overarching framework for human rights protection. From the perspective of Member States' legal systems, such as Ireland's, which was directly at issue in *Bosphorus*, the decision highlights the recognition by the European Court of Human Rights of the effective transfer of fundamental rights protection to the EU level within areas of EU law. The deference shown by both national courts, and by the ECtHR, makes it all the more important that the system for protection of fundamental rights within the EU is robust.

This issue came to the fore in the *Kadi* case which has been described by one of the early contributions as "the most important judgment ever delivered by the ECJ on the relationship between EC and international law and one of its most important judgments on fundamental rights"[133] and which has generated an extensive body of commentary.[134] The background to the proceedings lies in Security Council resolution 1267, and its successors, which took measures against Usama Bin Laden, Al-Qaida and the Taliban, including the establishment of a Sanctions Committee with the power to designate associated entities and individuals as persons suspected of supporting terrorism and then, *inter alia*, to freeze their assets. On the basis of such a designation, the applicants were included in the annexes to a succession of EU regulations giving effect to these resolutions. In the absence of any procedure for challenging their designation under resolution 1267 before the Security Council Sanctions Committee, the applicants challenged the lawfulness of the EU implementing regulations on the basis that they breached their fundamental rights, specifically the right to a fair hearing, the right to property and the right to effective judicial review. The Court of First Instance, considering that Article 103 of the UN Charter (which provided that Member States' obligations under the Charter prevailed over any other international obligation) bound the EU and Member States, held that its jurisdiction to review the regulations implementing Security Council resolutions

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(2010) 10 *HRLR* 529; Biehler, "Between the Irish, the Strasbourg and the Luxembourg Courts: Jurisdictional Issues in Human Rights Enforcement" (2006) 13(1) *DULJ* 317.

[132] See Costello, note 131; Hoffmeister, "International Decisions: Bosphorus v. Ireland" (2006) 100 *AJIL* 442, at 447.

[133] Tridimas and Gutierrez-Fons, "EU Law, International Law and Economic Sanctions Against Terrorism: The Judiciary in Distress?" (2009) 32 *Fordham ILJ* 901.

[134] For an excellent survey of the literature in the major European languages, see Poli and Tzanou, "The *Kadi* Rulings: A Survey of the Literature" in Cremona, Francioni and Poli eds, note 36, at 139.

was limited to assessing their compatibility with *jus cogens* by which the Security Council was bound and from which no derogation was possible. After conducting this limited review, it rejected the applicants' argument.[135]

On appeal to the Court of Justice, Advocate-General Maduro rejected the argument that a measure necessary for the maintenance of international peace and security could operate "so as to silence the general principles of Community law and deprive individuals of their fundamental rights".[136] Noting that the pressure to take measures in disregard of fundamental rights was particularly strong at times when risks to public security were believed to be extraordinarily high, he stated that, in such circumstances, "the courts should fulfil their duty to uphold the rule of law with increased vigilance".[137] The Advocate General thus undertook a full review of the regulation's compatibility with the appellant's fundamental rights and concluded that the regulation violated those rights.[138]

In its judgment, the Court of Justice also rejected the approach taken by the Court of First Instance and found for the appellants. Having reaffirmed that the Community was "based on the rule of law inasmuch as neither the Member States nor its institutions [could] avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty,..."[139] and that an international agreement could not affect the allocation of powers fixed by the Treaties or the autonomy of the Community legal system,[140] the Court stressed the importance of fundamental rights within the EU legal system: fundamental rights were a "condition of the lawfulness of Community acts"[141] and "all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review ...".[142] At the same time, the Court emphasised that its review was confined to the regulation, not to the underlying Security Council resolution.[143] While reiterating the Community's obligation to respect international law in the exercise of its powers,[144] and the special significance of the UN Charter and Security Council resolutions,[145] it carefully circumscribed its competence in relation to the

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[135] T-315/01 *Kadi* [2005] ECR 2005 II-3649.
[136] Opinion of Advocate General Poiares Maduro (16 January 2008), at para. 34.
[137] Joined Cases C-402/05P and C-415/05P *Kadi and Al Barakaat* [2008] ECR I-6351, at para. 35.
[138] *Ibid.*, at para. 55.
[139] *Ibid.*, at para. 281.
[140] *Ibid.*, at para. 282.
[141] *Ibid.*, at para. 284.
[142] *Ibid.*, at para. 285.
[143] *Ibid.*, at para. 286-7.
[144] *Ibid.*, at para. 291.
[145] *Ibid.*, at para. 294.

implementation of such resolutions by reference to the text of the Treaties and rejected the contentions that the mere fact that the regulation implemented such a resolution,[146] or the terms of Article 307 EC,[147] precluded it from reviewing such a measure. Finally, the Court rejected an argument which invited it, by analogy with the ECtHR's approach in *Bosphorus*, to defer to the human rights protection afforded to the applicants in the evolving procedure before the UN Security Council Sanctions Committee. Such deference was unjustified because the re-examination procedure before the Sanctions Committee did not offer "the guarantees of judicial protection" and remained "in essence diplomatic and intergovernmental".[148] As a result, the Court undertook a full review of the regulation's compatibility with the appellants' fundamental rights. In the first instance, in the circumstances surrounding the appellants' inclusion in the annexes to the regulation, "the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected".[149] After a careful examination, the Court also held that the regulation constituted an unjustified restriction of the right to property.[150]

Notwithstanding its findings, the Court did not annul the regulation with immediate effect but rather allowed the Council three months in which to remedy the infringements found.[151] Following the judgment, Mr. Kadi was included in the annex to another regulation freezing his assets. Recently, the Court of First Instance has annulled that measure on the basis of its infringement of fundamental rights.[152] In the meantime, the UN Secretary-General appointed an Ombudsperson to the 1267 Committee, charged with considering requests from individual and entities seeking removal from the Committee's Consolidated List.[153] The *Kadi* saga thus continues.

Few cases have inspired as much as commentary and criticism as *Kadi*[154] and even fewer have placed into such sharp relief the relationship between international law, EU law and the law of Member States such as Ireland. While many commentators have focused on the specific legal issues facing the Court, others have drawn from *Kadi* wider lessons on the European Union's place in the international

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[146] *Ibid.*, at para. 295-299.
[147] *Ibid.*, at para. 300-307.
[148] *Ibid.*, at para. 322-323.
[149] *Ibid.*, at para. 334.
[150] *Ibid.*, at para. 370.
[151] *Ibid.*, at para. 373-376.
[152] T-85/09 Kadi (Judgment of 30 September 2010, nyr).
[153] See http://www.un.org/sc/committees/1267/delisting.shtml (last accessed 25 October 2010)
[154] See the survey referred to at note 134.

legal system.[155] For example, de Búrca has criticised the decision, in particular on account of its "significant implications for the image the EU has long cultivated of itself as an actor which is committed to "effective multilateralism" professing a distinctive allegiance to international law and institutions and seeking to carve out a global role for itself as a normative power".[156] Besson, on the other hand, has stated that it is "the Court's dualist model of the relationship between European and international law that best fits democratic requirements".[157]

First, and fundamentally, *Kadi* involved a conflict between international law (in this case, the Security Council resolutions, as mediated by the EU regulations, and more broadly the UN Charter) and internal constitutional law (fundamental rights and more broadly, it might be said, the rule of law protected by the Treaties). Secondly, in *Kadi* as in *Bosphorus*, this conflict between international and internal constitutional norms took place within a complex setting involving the interplay, explicitly and implicitly, between a wide range of international obligations binding on EU Member States (those under the European Treaties, the European Convention on Human Rights, the United Nations Charter and Security Council resolutions, *jus cogens*). Such conflicts present the most serious challenges for internal legal systems in the implementation of international law.

As a matter of principle, embodied in the 1937 Constitution and the European Treaties, Ireland and the EU must respect international law. In other words, respect for international law is itself a constitutional value. However, in the implementation of international obligations within their internal legal systems, the Irish and EU legal systems must also respect other core constitutional values, such as the protection of fundamental rights or the constitutional allocation of power. In some cases, creative solutions, such as that in *Bosphorus*, might permit these competing values to be reconciled. However, where there is an irreconcilable conflict between the general respect for international law, on the one hand, and specific principles of internal constitutional law, on the other, domestic courts may be required to uphold the internal constitutional law but the political organs of government (or, in the case of the Irish Constitution, in final appeal, the people) could decide whether, and how, to strike a different balance between the competing constitutional values. In *Kadi*, because of the wide constitutional immunity afforded to EU law in Member States,

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[155] *Ibid.*

[156] See de Búrca, "The European Court of Justice and the International Legal Order After *Kadi*" (2010) 51 *Harvard International Law Journal* 1, at 48-49.

[157] Besson, "European Legal Pluralism after *Kadi*" (2009) 5 *EuConst* 237, at 263.

failure on the part of the Court of Justice to ensure protection for fundamental rights in this context would have completely insulated Security Council resolutions from review. In turn, in light of the *Solange* doctrine,[158] it could have risked Member States' constitutional courts calling into question the protection of fundamental rights at the EU level. While protecting the autonomy of the EU legal order, the Court clearly placed Member States' fulfillment of their international obligations under the Charter in jeopardy. It fell to the Member States, acting within the EU or without, to find an appropriate, political solution to this conflict.

While the multi-level nature of internal constitutional norms in the EU and its Member States adds an additional layer of complexity to this balancing process, the basic principle is clear: implementation of international law must be undertaken with respect for core principles of constitutional law which, for Ireland, encompasses both the 1937 Constitution and the European Treaties.

E. Assessment

Over time, the role of the EU in the implementation of UN Security Council resolutions, particularly those imposing economic sanctions, has changed dramatically. Initially, in the case of Rhodesia, it was considered to have no role to play in the implementation of the relevant resolutions. Since then, a procedure for the implementation of Security Council resolutions imposing economic sanctions has been embedded into the European Treaties. The role remains nuanced in certain respects: not only are there substantive limits to the EU's competence, the structure through which sanctions are given effect in the EU requires, in the first instance, a unanimous political decision of the Member States within the framework of the CFSP before the Community institutions can enact the appropriate implementing legislation. Yet, in practice, the EU has come to play a central role in this process.

By acting through the EU, on the basis of a unanimous decision of all Member States within the CFSP and in accordance with the relevant provisions of the Treaties, Member States have ensured uniformity in the interpretation and application of such sanctions. By conferring on the sanctions the character of EU law, they have also ensured their direct applicability, binding effect, and superior

[158] See 37 BVerfGE 271 (Solange I); 73 BVerfGE 339 (Solange II).

status vis-à-vis any inconsistent law, within Member States' legal systems.[159] Yet, as the *Kadi* case so clearly demonstrates, because of the high degree of constitutional immunity this confers on these measures in Member States' legal systems, the EU is also called upon to ensure the protection of fundamental rights in that process.

V. CONCLUSION

Security Council resolutions under Article 41 have changed dramatically over the past 20 years. While such resolutions were only rarely used during the Cold War and, when so used, were relatively discrete and focused, recent years have witnessed not only a significant rise in the number of resolutions but also a major expansion in their range and effects. These effects have increasingly been felt in internal legal systems, coming into tension with fundamental rights. During this period, the role of the EU in the implementation of Security Council resolutions has also increased.

The role of the EU in this process has some unusual features. First, the EU is not and cannot be a member of the United Nations and it is not directly bound by obligations arising under the Charter or UN Security Council resolutions. Secondly, insofar as the Member States have transferred competence to the EU to implement sanctions, they have done so using a distinctive structure which combines action under the Common Foreign and Security Policy (CFSP) in the Treaty on European Union with action under the Treaty on the Functioning of the European Union. In particular, a unanimous decision of the Member States is required within the framework of the CFSP before action can be taken under the TFEU. Thirdly, while the EU is given a broad competence in relation to economic sanctions, Member States retain competence in certain areas, some of which involve further implementation of EU measures while others require entirely independent implementing action. While working through the EU to give effect to some of their obligations, Member States continue to be directly bound by those obligations. Unlike in other areas, it is not simply a question of transferring competence to the EU.

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[159] "The interposition of Community legislation between the United Nations and States members of both organizations may affect the scope, timing and interpretation of Security Council resolutions, factors which must be taken into account in evaluating their effects on sanctions implementation. On the other hand the direct effect of Community Regulations undoubtedly contributes to enhancing the reception of Security Council resolutions in domestic law": Gowlland-Debbas, note 29, at 647. See also Lavranos, note 37, at 110-111.

Nevertheless, the EU now plays an extremely important role in the implementation of economic and related sanctions imposed by the Security Council. As Lavranos has described the position:

> For the EU Member States, the classic relationship between national law and the law of IOs is modified since EU membership has added a new distinct layer between the international and national legal orders, thereby affecting the classic legal situation.[160]

The effect of this new distinct layer is that, when the Member States decide to implement resolutions through the EU in accordance with the procedure laid down in the Treaties, they confer upon such resolutions, as embodied in EU regulations, the qualities of direct applicability, binding force and superior status vis-à-vis the law of Member States, which characterise the status of those regulations in the EU legal system generally. Thus, although the means by which the international obligation takes effect differs from that relating to other sources of international law already examined, the effect is similiar, insofar as resolutions enjoy a higher status within the EU legal system than that which they might otherwise enjoy in the Irish legal system. In Ireland, there is an added dimension to this effect, having regard to the doubts over the constitutionality of UN membership in the wake of *Crotty*.[161] Moreover, as its *Bosphorus* decision demonstrates, the Court of Justice has the final say on the interpretation of such legislation, as with all EU legislation, albeit with the caveat that such legislation may directly or indirectly be the subject of review before the ECtHR.

The implementation of Security Council resolutions within the Irish and EU legal system also highlights the inadequacies of monism and dualism. While individual elements of this tripartite relationship might be isolated and labelled with those terms, the relationship as a whole is not amenable to explanation in those terms. As the *Bosphorus* and *Kadi* cases showed, this relationship involves the complex interaction of a wide range of sources of national, EU and international law. While the case of *Bosphorus* was an instance in which these different and sometimes competing sources of law were reconciled or at least placed within an effective working relationship, *Kadi* by contrast demonstrated that in some circumstances the reconciliation of international obligations with internal law is not possible without sacrificing fundamental principles of that internal law and potentially posing the risk

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[160] Lavranos, note 37, at 4.
[161] Chapter 2, Section II.F.

of a conflict between EU law and Member States' constitutional laws. Having decided to act through the EU in implementing these measures, Member States also relied on the EU to protect those fundamental principles.

In conclusion, while it is of a very different character to the effects on other sources of international law, the effect of EU membership on the implementation of Security Council resolutions in Member States' legal systems is undoubtedly significant.

CHAPTER 6.

IMPLEMENTATION OF INTERNATIONAL JUDICIAL DECISIONS IN THE IRISH LEGAL SYSTEM

I. INTRODUCTION

Recent decades have witnessed the phenomenon of the proliferation of international tribunals to which members of the international community may have recourse as a means of dispute settlement.[1] This has in turn generated a substantial, and ever-increasing, body of international judicial decisions across a wide range of areas of international law. According to Article 38(1)(d) of the Statute of the International Court of Justice, "judicial decisions", along with "the writings of highly qualified publicists", are "subsidiary means for the determination of rules of law". Although international judicial decisions are thus not regarded as a formal source of international law, they nonetheless enjoy a range of legal effects in the international legal system. Furthermore, just as they have become a more prominent feature of the international legal system, international judicial decisions have become increasingly relevant within internal legal systems. This chapter seeks to examine how international judicial decisions are given effect within the Irish legal system.

Following the structure of previous chapters, this chapter will first look briefly at certain important features of international judicial decisions as a legal category. It will then assess the implementation of international judicial decisions within the Irish legal system narrowly understood before considering the implementation of such decisions within the EU legal system. Finally, the conclusion will analyse the effect of the EU approach on that of the Irish legal system.

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[1] See e.g. Charney, "Is International Law Threatened by Multiple International Tribunals?" (1998) 271 *Recueil des Cours* 101; Various authors, "The Proliferation of International Tribunals: Piecing together the Puzzle" (1999) 31 *NYU JILP* 679; Higgins, "A Babel of Judicial Voices: Ruminations from the Bench" (2006) 55 *ICLQ* 791; Buergenthal, "Proliferation of International Courts and Tribunals: Is It Good or Bad?" (2001) 14 *Leiden JIL* 267; Shany, *The competing jurisdictions of international courts and tribunals* (Oxford University Press, 2004).

II. INTERNATIONAL JUDICIAL DECISIONS

At the time that the Statute of the International Court was originally drafted, "judicial decisions" played a much less important role in the international legal system than they do today. With the exception of the Central American Court of Justice established in 1907, international judicial institutions were non-existent. Insofar as there was an international jurisprudence, it was to be found in the decisions of international arbitral tribunals or mixed commissions. Judicial decisions on issues of international law were largely confined to national courts. The Permanent Court of International Justice, the predecessor to the current International Court, was the first standing international tribunal of general jurisdiction. Thus, its establishment marked an important stage in the development of international tribunals as part of the international legal system. Since then, a diverse range of international courts, tribunals and similar bodies have emerged, varying in the subject-matter they adjudicate upon, the legal persons which can appear before them, and the geographical scope of their jurisdiction.[2] Ireland, directly and through the EU, is a party to a wide range of these dispute settlement mechanisms, at the regional and global level. This chapter will adopt a flexible approach to the concepts of international tribunals and international judicial decisions so as to include the decisions of quasi-judicial tribunals and similar bodies within its remit.

While the International Court of Justice remains "the only judicial body vested with a universal and general subject matter jurisdiction" and, as the principal judicial organ of the UN, enjoys unique legitimacy,[3] other international tribunals exercising judicial or quasi-judicial functions have also contributed to the rapidly expanding body of international decisions which now exercise great influence within the international legal system. Boyle and Chinkin describe the growth of international courts and tribunals as "a significant vehicle for the integration of international law into international affairs".[4] However, the rising number of international tribunals, often with limited jurisdictions in specialised fields such as

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[2] For a comprehensive listing of the various courts and tribunals, see the website of the Project on International Courts and Tribunals: http://www.pict-pcti.org/ (last accessed 24 October 2010).

[3] Higgins, "The International Court of Justice, the European Court of Justice and the Integrity of International Law" (2003) 52 *ICLQ* 1, at 18.

[4] Boyle and Chinkin, *The Making of International Law* (Oxford University Press, 2007), at 269.

trade, human rights, criminal law or the law of the sea, has also given rise to considerable controversy about the fragmentation of international law.[5]

Returning to Article 38(1)(d), judicial decisions are described in that provision as a "subsidiary means" for determining the rules of law, or the rules of international law more specifically. This envisages the role of judicial decisions as being one of assistance in identifying and applying rules of international law. They may shed light on the interpretation of a provision of an international agreement. They may help to determine the content and scope of a rule of customary international law or, as Boyle and Chinkin aptly describe it, "clarify its mysteries".[6] They may also guide another court in defining the relationship between different sources of international law. Given the particular characteristics of the international legal system, this role is particularly important:

> In a decentralized system without a legislative body or authoritative law-making process and where unwritten law is developed through amorphous processes of state practice and *opinio juris*, judicial decision-making carries great weight through exposition of law.[7]

Thus, while formally international judicial decisions are very much secondary in their status, in practice, they often enjoy a high degree of authority and their statements of law are accepted as representing the state of the law in a particular field.[8]

Echoing in some respects analogous debates about the nature of the judicial function in national legal systems,[9] the discrepancy between the formal and informal legal effects of international judicial decisions has sparked lively debate. While, as Fitzmaurice acknowledged, the fact that international judicial decisions "are not in the strict sense formal sources can indeed hardly be contested", "it is also not satisfactory to regard them as being simply one amongst various material sources of

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[5] See the Report of the Study Group of the International Law Commission, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law" A/CN.4/L.682 available online at http://untreaty.un.org/ilc/documentation/english/a_cn4_l682.pdf (last accessed 24 October 2010).

[6] Boyle and Chinkin, note 4, at 278.

[7] Boyle and Chinkin, note 4, at 268.

[8] As Judge Jessup succinctly said, "the influence of the Court's decisions is wider than their binding force": *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), Second Phase, Judgment (separate opinion of Judge Jessup), (1970) ICJ Reports 163, at para.9.

[9] "Once the judicial function is admitted in any legal system, it operates, even if within narrow limits, as a creative source of law": Waldock, "General Course on Public International Law" (1962) 106 *Recueil des Cours* 1, at 95. As noted in Chapter 4, similar echoes can be heard in the debate over the incorporation and transformation doctrines: see Chapter 4.III.C.

law".[10] Fitzmaurice concluded that the international judicial decision "must be regarded as having a special status that differentiates it from other material sources, and causes it to be at least a quasi-formal source".[11] Ross, referring to the "the illusion that practice is merely 'subsidiary means', and not an actual source", concluded that "whether or not the court formally believes in the binding force of precedents is actually of no great consequence...".[12] More recently, Boyle and Chinkin have observed that some courts, such as the International Court of Justice, can play a major law-making role: by "affirming the law-making effect of multilateral agreements, UN resolutions, ILC codification or other products of the international law-making processes"; by drawing upon " a rather broader legal basis for their decisions and articulating rules and principles of law that can only be described as novel and are not necessarily supported by evidence of general state practice or *opinio juris*".[13] Of course, the law-making potential of international judicial decisions should not be exaggerated and their effect "is contingent on the response of a broader international community..."[14] not to mention the inherent persuasive force of the reasoning of such decisions. Although the international legal system recognises no doctrine of binding precedent similar to that found in common law systems,[15] the persuasive or influential authority of international judicial decisions can be considerable. Again, to take the example of the International Court of Justice, States coming before the Court treat such decisions with great respect because they are, as Higgins has pointed out, at once an authoritative pronouncement on the law in respect of that particular dispute but also an indication of the conclusions that the Court would reach if faced with a similar case.[16] However, not all international tribunals enjoy the same legitimacy and authority as the ICJ and, in appraising the authority of international judicial decisions, regard must be had to a range of factors such as "the particular tribunal, its institutional setting, the context of

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[10] Fitzmaurice, "Some Problems Regarding the Formal Sources of International Law" in *Symbolae Verzijl* (The Hague, 1958), at 169.
[11] *Ibid.*
[12] Ross, *A Textbook of International Law* (London, 1947), at 86-87: "Nevertheless it necessarily follows from the tendency of the law to regularity that precedents must exercise a decisive influence on later decisions. The reluctance to admit this is connected with the reluctance to concede that courts are law-creating. Hence the illusion that practice is merely 'subsidiary means', and not an actual source. And as a matter of fact courts as well as the authors constantly quote precedents in support of their results...[referring to the growing role of the International Court of Justice] whether or not the court formally believes in the binding force of precedents is actually of no great consequence..."
[13] Boyle and Chinkin, note 4, at 310-311.
[14] *Ibid.*
[15] Shahabuddeen, *Precedent in the World Court* (Cambridge University Press, 1996), at 97.
[16] Higgins, *Problem and Process: International Law and How We Use It* (Oxford University Press, 1995), at 202-3, quoted in Boyle and Chinkin, note 4, at 294.

the dispute, the identity of the parties and the makeup of the decision-making body".[17]

As international judicial decisions increasingly deal with issues which also arise within internal legal systems, perhaps most significantly in the sphere of human rights, they may also serve as persuasive authority in national courts. The receptiveness of national courts to the persuasive authority of international judicial decisions has varied widely, over time and across jurisdictions. While a range of factors affect the degree of receptiveness, it is clear that, because of the lack of formal and binding effect of these decisions, much depends upon the legal culture of national courts and attitudes to international law generally.

Before analysing the implementation of international judicial decisions in the Irish legal system, it is necessary to distinguish a particular type of international judicial decision, that relating to a dispute to which a specific State is a party, from international judicial decisions generally. While international judicial decisions as a general matter may not impose any binding legal obligations on a State, the international agreements establishing dispute settlement mechanisms frequently provide for the binding effect of decisions on the States which are parties to a particular dispute. For example, in the case of the Statute of the International Court of Justice, Article 59 of the Statute provides "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case". While phrased negatively, and thus reinforcing the lack of formal authority of international judicial decisions generally as a source of international law, this provision clearly stipulates that a decision of the Court is binding on the parties to the dispute in respect of the particular case. Moreover, this provision is supplemented by Article 94(1) of the United Nations Charter under which each Member of the UN "undertakes to comply with the decision of the International Court of Justice in any case to which it is a party". Where an international dispute settlement mechanism contains similar provisions, which is not always the case, its decisions bind the parties as a matter of international law. However, as with other obligations deriving from international agreements, the effect of such decisions within internal legal systems depends on the approach to treaty obligations in general. This can give rise to considerable controversy, as recently demonstrated by the *Avena* and *Medellin*

[17] Boyle and Chinkin, note 4, at 266.

decisions of the International Court of Justice and the United States Supreme Court.[18]

To conclude, international judicial decisions are not an independent source of international law. However, while such decisions are formally only "subsidiary means" for determining the law, in practice they exercise a far greater degree of influence and authority in the identification, interpretation and application of international law than this classification suggests. Moreover, in the case of a decision on a dispute to which a particular State is party, compliance with that decision is often an independent obligation under the international agreement from which the international tribunal derives its jurisdiction. Thus, when examining the question of implementation, it is important to have regard to the range of possible legal effects of international judicial decisions. However, in all cases, the manner in which a State gives effect to such a decision within its internal legal order depends on its constitutional law. In the Irish legal system, the most significant body of international judicial decisions which have required implementation is that of the European Court of Human Rights (ECtHR). In the EU legal system, as well as decisions of the European Court of Human Rights, the decisions, which might be described as quasi-judicial, of the WTO Dispute Settlement Mechanism have also featured prominently.

[18] *Avena and Other Mexican Nationals (Mexico v. U.S.)* (2004) ICJ Reports 1; *Medellín v. Texas* (2008)128 SC 1346

III. IMPLEMENTATION WITHIN THE IRISH LEGAL SYSTEM

From its early days, Ireland has expressed support for the evolving structures of international dispute settlement. When it acceded to the Statute of the Permanent Court of International Justice in 1929, the Irish Free State did so, controversially and consciously in contradistinction to its fellow Dominions, without any reservation for intra-Commonwealth disputes.[19] In Article 29 of the 1937 Constitution, in addition to affirming "its devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality" in paragraph 1, Ireland affirms in paragraph 2 "its adherence to the principle of the pacific settlement of international disputes by international arbitration or judicial determination". While Ireland is, by virtue of its membership of the UN, a party to the Statute of the International Court of Justice, it has not yet accepted the jurisdiction of the Court under the Statute's so-called Optional Clause,[20] which is interesting in light of its history with the PCIJ.[21] However, Ireland has accepted the jurisdiction of other international tribunals, most significantly the European Court of Justice and the European Court of Human Rights.[22] Because of the special status of the European Court of Justice under the Treaties and the Constitution, the focus of this section is instead on the European Court of Human Rights.

In respect of the European Court of Justice, the binding effect of its decisions in the Irish legal system derives from the constitutional immunity afforded to the acts of the EU institutions by Article 29.4.6° and the Irish courts have never directly

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[19] Kennedy, *Ireland and the League of Nations 1919-1946* (Irish Academic Press, 1996), at 118-121.

[20] Possible acceptance of the jurisdiction of the Court under the Optional Clause (which involves making a declaration under Article 36(2) of the Statute) has long been mooted. See e.g. the following statement of the Minister of Foreign Affairs. "In the light of the terms of the Good Friday Agreement, the Government is now favourably disposed to accepting the compulsory jurisdiction of the International Court of Justice. However, the precise implications of making such a declaration, and the question of what, if any, conditions or reservations should attach to it, are complex legal matters which require careful study and consideration.": 549 Dáil Debates 1172 (7 February, 2002). Ireland is party to many multilateral agreements which contain dispute settlement clauses providing for recourse to the ICJ.

[21] Subsequent to the initial submission of this thesis, the Irish Government announced that it would be making a declaration accepting the compulsory jurisdiction of the International Court of Justice: see Coulter, "Ireland to accept compulsory jurisdiction of UN Court", *Irish Times*, 22 April 2011.

[22] Indeed, Ireland was the first State to accept the jurisdiction of the Court over individual petitions. See Schabas, "Ireland, the European Convention on Human Rights and the Personal Contribution of Seán MacBride" in Morison, McEvoy and Anthony eds, *Human Rights, Democracy, and Transition: Essays in Honour of Stephen Livingstone* (Oxford University Press, 2006) (noting that "Ireland was the first state *in the world* to accept a binding international petition mechanism before an international human rights court").

challenged the authority of the European Court of Justice.[23] Moreover, "while the doctrines of *stare decisis* and precedent do not formally exist in EU law",[24] the Court has affirmed that its interpretation of rules of EU law "clarifies and defines, where necessary, the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force..." and "must be applied by an administrative body within the sphere of its competence even to legal relationships which arose or were formed before the Court gave its ruling on the question of interpretation".[25] Although specifically referring only to administrative bodies, the principle applies with equal force to other national authorities, including courts.[26]

A. European Court of Human Rights

With the exception of the European Court of Justice, the European Court of Human Rights is without doubt the international tribunal which has exercised the most influence on the Irish legal system. The Irish experience before the European Court of Human Rights has been long and interesting: having been the first State to accept the jurisdiction of the Court over individual petitions,[27] the State was also the respondent in the first case decided by the Court, *Lawless v. Ireland*;[28] Ireland was also the applicant in the first, and one of the few, inter-State cases taken to the Court, *Ireland v. United Kingdom*;[29] the State has appeared before the Court in dozens of cases, some of which have resulted in adverse decisions. In order to understand the effect of decisions of the ECHR within the Irish legal system, in line with the distinction set out in Section II, it is necessary to distinguish the effect of those decisions to which Ireland was a party from the effect of the jurisprudence of the Court generally.

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[23] See Hogan and Whyte, *J.M. Kelly: the Irish Constitution* (4th ed., LexisNexis Butterworths, 2004), where the editors state, at paras. 5.3.95-96, that, although "there have been some hints that the national courts may be reluctant to yield total supremacy in the area of fundamental rights", Walsh J's remarks in *SPUC v. Grogan* [1989] IR 753, at 768-9, (that it was for the Supreme Court in the final analysis to determine the interaction between the constitutional provision prohibiting abortion and that which gives effect to EU membership), "must be regarded as isolated ones and entirely confined to an area of great sensitivity and it is unlikely that they would nowadays be followed".

[24] Chalmers, Davies and Monti eds, *European Union Law* (2nd ed, Cambridge, 2010), at 169.

[25] Case C-453/00 *Kühne & Heitz* [2004] ECR I-837, at paras. 21-22.

[26] See Chalmers, Davies and Monti eds, note 23, at 171.

[27] Schabas, note 21.

[28] See *Lawless v Ireland (No. 1)* (1979-80) 1 EHRR 1; *Lawless v Ireland (No. 2)* (1979-80) 1 EHRR 13; *Lawless v Ireland (No. 3)* (1979-80) 1 EHRR 15.

[29] *Ireland v. United Kingdom* (1979-80) 2 EHRR 25.

i. Decisions to which Ireland is a party

Article 46(1) of the European Convention on Human Rights (ECHR) provides that parties to the Convention "undertake to abide by the final judgment of the Court in any case to which they are parties". This imposes an international obligation on the State to comply with the decision to which it is a party. In the case of adverse decisions, therefore, the State is obliged as a matter of international law to take the necessary steps to "abide by the final judgment of the Court".

The procedure by which compliance is assessed within the ECHR regime is set out in paragraphs 2 to 5 of Article 46. Under paragraph 2, the final judgment of the Court is "transmitted to the Committee of Ministers, which shall supervise its execution". Paragraph 3 allows the Committee to refer any problems of interpretation of the judgment to the Court.[30] If the Committee considers that the State has refused to abide by a final judgment, it may refer to the Court the question of whether the State has failed to fulfil its obligation under Article 46(1) and, if this is found to be the case, the Court refers the case to the Committee "for consideration of the measures to be taken".[31] Although the procedure envisages a certain volley between the Court and the Committee in cases of doubt regarding compliance, the process is primarily political, vesting supervision of compliance in the Committee of Ministers, which is a governmental body comprised of the Minister of Foreign Affairs or, in practice and in their place, the permanent representative of each High Contracting Party.[32]

There are two dimensions to compliance with an adverse decision of the European Court of Human Rights: the payment of just satisfaction or the taking of other individual measures in favour of the applicant(s) whose rights under the

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[30] Article 46(3): If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee.

[31] Article 46(4) and (5).

[32] Once the Court's final judgment has been transmitted to the Committee of Ministers, the latter invites the respondent State to inform it of the steps taken to pay any just satisfaction (compensation and/or costs and expenses) awarded as well as of any individual or general measures which may be necessary in order to comply with the State's legal obligation to abide by the judgment. In the performance of this task the Committee is assisted, in addition to its own secretariat, by a special department of the Council of Europe's Secretariat – the Department for the Execution of judgments of the European Court of Human Rights.

Convention have been violated; and the taking of general measures to ensure that there are no further violations of this kind.[33]

In the first instance, the individual measures will generally involve the payment of just satisfaction to the applicant whose rights have been violated, something which is defined in the Court's judgment.[34] However, in some cases, just satisfaction alone will not suffice to redress the violation and other measures may be required such as the reopening of national proceedings.

While the general measures also vary from case to case, amendment of national legislation is a common requirement.[35] In Ireland, adverse rulings of the European Court of Human Rights have frequently triggered law reform.[36] The early case of *Airey v. Ireland*[37] led to the introduction of a non-statutory and, much later, a statutory scheme for civil legal aid.[38] The adverse ruling in *Johnston v. Ireland*[39] led to the enactment of the Status of Children Act 1987, giving equal rights to children born within or outside marriage.[40] The decision in the case of *Norris v. Ireland*[41] paved the way for the decriminalisation of homosexual conduct between adult males, albeit some time after the decision was handed down.[42] In other cases, the general measures are more diffuse. In relation to the recent string of decisions concerning the excessive length of civil and criminal proceedings in Ireland and the lack of an effective domestic remedy for this problem,[43] in addition to individual measures, among the general measures being taken by the State and considered by the Committee of Ministers are the following: improvement of judicial management; creation of a register of reserved judgments; appointment of new judges and judicial

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[33] See generally the excellent website of the Council of Europe on the Execution of Judgments: http://www.coe.int/t/dghl/monitoring/execution/default_en.asp (last accessed 24 October 2010).

[34] Article 41 ECHR: "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

[35] See General measures adopted to prevent new violations of the European Convention on Human Rights, Document H/Exec (2006) 1, available online at http://www.coe.int/t/dghl/monitoring/execution/Documents/MGindex_en.asp (last accessed 24 October 2010).

[36] Flynn has commented that, in many cases, the effect of the ECtHR decisions has been to accelerate rather than to generate Irish law reform: Flynn, "The Significance of the European Convention on Human Rights in the Irish Legal Order", (1994) *Irish Journal of European Law* 4.

[37] *Airey v. Ireland* (1979-80) 2 EHRR 305.

[38] Scheme of Civil Legal Aid and Advice 1980 (Prl 8543) and now the Civil Legal Aid Act 1995. See Resolution DH 1981-008.

[39] *Johnston v. Ireland* (1987) 9 EHRR 203.

[40] As discussed in Chapter 3, this had already been the subject of a recommendation from the Law Reform Commission: see Chapter 3.III.B.i.b.

[41] (1991) 13 EHRR 186.

[42] Criminal Law (Sexual Offences) Act 1993. See Resolution DH (93) 62.

[43] *Doran v. Ireland* (2006) 42 EHRR 13; *O'Reilly v. Ireland* (2005) 40 EHRR 40; see also application 42297/98 *McMullen v. Ireland* (judgment of 29/07/2004, final on 29/10/2004) and application 18273/04 *Barry v. Ireland* (judgment of 15/12/2005, final on 15/03/2006).

assistants; and the institution of a superior court 'fast track system'.[44] In view of further cases raising similar issues on its docket, the Committee of Ministers is still considering the adequacy of these measures.[45]

In other cases, the effect of the adverse ruling of the ECtHR must be seen within a broader perspective. A particularly interesting example of such a case in the context of the interaction between national, EU and international legal orders, is that of the abortion information saga which came before the Irish superior courts, the European Court of Justice and the European Court of Human Rights in the late 1980s and early 1990s.[46] After the Supreme Court had held that Article 40.3.3 (which protected the right to life of the unborn) prohibited activities assisting directly or indirectly pregnant women who sought to leave the State for the purposes of having an abortion, including the provision by clinics of 'non-directive' counselling on abortion options[47] and the dissemination of information on abortion clinics by student organisations,[48] the matter came before the courts in Luxembourg and Strasbourg. In October 1991, the European Court of Justice ruled that, while the provision of an abortion in Member States where this was lawful did indeed constitute a "service" within the meaning of Article 60 of the EEC Treaty, the ban on the provision of information in this case did not constitute a restriction on the freedom of movement, because of the lack of a economic link between the student organisations and the abortion clinics in England.[49] While the parties in the *Open Door Counselling* case had applied to the European Court of Human Rights, a number of dramatic events took place in Ireland. First, the growing public controversy over the question of abortion peaked in the wake of the *X* case,[50] where the Supreme Court set aside an injunction granted by the High Court, restraining a teenage rape victim from travelling to England for an abortion, with a majority

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[44] See *Doran v. Ireland* in the State of Execution part of the Council of Europe website: http://www.coe.int/t/DGHL/MONITORING/EXECUTION/Reports/Default_EN.asp?dv=1&StateCode=IRL (last accessed 24 October 2010).

[45] *Ibid.* The Court recently handed down an adverse ruling in another case relating to delay, *McFarlane v. Ireland* (judgment of 10th September 2010).

[46] For a contemporaneous analysis of many of these issues, see the series of articles by Kingston and Whelan, "The Protection of the Unborn in Three Legal Orders" (1992) 10 *ILT* 93 (Part I), 104 (Part II), 166 (Part III), 279 (Part IV).

[47] *Attorney General (SPUC). v. Open Door Counselling Ltd.* [1988] IR 593.

[48] *SPUC (Ire.) Ltd. v. Grogan* [1989] IR 783.

[49] Case C-159/90 *SPUC v. Grogan* [1991] ECR I-4733. For a discussion of the issues raised by the Court of Justice's judgment, see Phelan, "Right to Life of the Unborn v. Promotion of Trade in Services: the European Court of Justice and the Normative Shaping of the European Union" (1992) 55(5) *Modern Law Review* 670 and de Burca, "Fundamental Human Rights and the Reach of EC Law" (1993) 13(3) *Oxford Journal of Legal Studies* 283.

[50] *Attorney-General v. X* [1992] 1 IR 1.

holding that an abortion would not have been unlawful in the State in circumstances where the risk to the life of the mother from suicide was of sufficient gravity. Second, in the shadow of the European Court of Justice's ruling in the *Grogan* case, the Government had secured a protection of the Irish constitutional prohibition on abortion through Protocol No. 17 to the Maastricht Treaty.[51] Third, amid concerns over the legal position, the main political parties agreed to put two amendments to the Constitution before the people, one guaranteeing the right to travel and the other guaranteeing the right to information on abortion.[52] In its judgment of 29 October 2002, the European Court of Human Rights held that the restraint on receiving or imparting information on abortion was a disproportionate restriction on the freedom to "receive and impart information and ideas without information" guaranteed by Article 10 of the ECHR.[53] The proposed amendments to the Constitution guaranteeing the right to travel and the right to information were passed in November 1992. In 1995, the High Court lifted the injunction which had been imposed insofar as the Dublin Well Woman Centre Ltd. was concerned. On this basis, the Committee of Ministers was satisfied that the State had complied with the ECtHR's judgment.[54] Nevertheless, the recent ruling of the European Court of Human Rights in the *A, B & C* case[55] - finding that Ireland had violated the third applicant's right to privacy under Article 8 ECHR by failing to implement the existing constitutional right to a lawful abortion in circumstances where that applicant was suffering from a rare form of cancer which she feared might relapse as a result of the pregnancy – is a timely reminder of the difficulties which remain in this area. In circumstances where the Protocol to the European Treaties has effectively removed the issue from the purview of the EU Courts, recourse to Strasbourg has become all the more important in the face of longstanding domestic political inertia.

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[51] The Protocol was in the following terms: "Nothing in the Treaty on European Union or in the Treaties establishing the European Communities, or in Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland". See now Protocol No. 35 to the Treaty on European Union and the Treaty on the Functioning of the European Union.

[52] See respectively the Thirteenth Amendment of the Constitution Act, 1992 and the Fourteenth Amendment of the Constitution Act, 1992. The latter amendment was given further effect through the Regulation of Information (Services outside the State for Termination of Pregnancies) Act, 1995.

[53] *Open Door Counselling Ltd. & Dublin Well Woman Centre Ltd. v. Ireland* (1993) 15 EHRR 244.

[54] See Resolution DH (96) 368.

[55] *A, B, and C v. Ireland* (Application no. 25579/05), judgment of the Grand Chamber, 16 December 2010.

The case of *Quinn v. Ireland*[56] highlights that, notwithstanding the binding effect of decisions of the Court and the enforcement mechanism established under Article 46, the Irish courts are not bound by such decisions. In that case, the ECtHR held that the prosecution of the applicant, under section 52 of the Offences Against the State Act 1939 for failure to account for his movements, was in breach of his right to silence under Article 6(1) ECHR and in breach of the presumption of innocence protected under Article 6(2) ECHR. Following the decision of the ECtHR, the applicant sought an order from the High Court quashing his conviction and declaring the provision unconstitutional, notwithstanding that an earlier decision of the Supreme Court had upheld its constitutionality. In the circumstances of the case and in the interests of justice, the Court granted the order quashing the applicant's conviction.[57] However, the Court rejected the argument that the effect of the ECtHR judgment, which had "made a finding of violation in favour of the applicant and also awarded him a sum in compensation for non-pecuniary damage", was a "requirement on the State to repeal or otherwise nullify legislation".[58]

More recently, in *McFarlane v. D.P.P.*,[59] a case which has since led to another adverse ruling by the ECtHR against Ireland,[60] the applicant sought an order prohibiting his trial on the grounds of delay and, to this end, relied on a number of decisions of the ECtHR which had found that Ireland was in breach of Article 6(1) for failure to ensure the trial of civil and criminal proceedings within a reasonable period of time. However, the Supreme Court, distinguishing the obligations of the State under international law from those under Irish law, rejected the reliance on those decisions and adopted a narrow view of the effect of an adverse ruling by the ECtHR:

> Thus a successful applicant before the Court of Human Rights may, in addition to having a finding made in his favour, be awarded a monetary sum. But the decision, both as to finding and the award of *just satisfaction* are made against the member state and are binding in international law. The court does not make any decision adverse to or binding on the courts or the prosecuting authorities. In particular, the Court of Human Rights has no power to and does not purport to make any orders affecting national

[56] *Quinn v. O'Leary* [2004] 3 IR 128.
[57] [2004] 3 IR 128, at 170.
[58] [2004] 3 IR 128, at 162.
[59] *McFarlane v. D.P.P.* [2008] 4 IR 117.
[60] See supra note 44.

proceedings. It does not order them to be stopped and does not even express any view as to whether they should be stopped.[61]

While the subsequent history of the *McFarlane* case undoubtedly causes one to question whether the Court paid sufficient heed to the jurisprudence of the ECtHR, the basic principle that such decisions have no direct or binding effect within the Irish legal system is clearly established. In line with other obligations arising under the Convention, in accordance with Article 29.6, the obligation to comply with decisions of the ECtHR forms no part of Irish law in the absence of appropriate implementing legislation. This position is anchored in the separation of powers established by the 1937 Constitution. If an adverse ruling of the ECtHR effectively requires the State to change Irish law, the appropriate organ to effect that change is the legislative organ, the Oireachtas. If the courts endeavoured to do so in its place, they would trespass into the sphere of the legislative power.

ii. Jurisprudence of the Court generally

Beyond those decisions to which the State is a party and is under an international obligation to abide by, what is the effect of other decisions of the Court within the Irish legal system? If decisions binding under Article 46 of the Convention have no binding or direct effect within the Irish legal system, it follows *a fortiori* that decisions to which the State is not a party enjoy no such force.

The European Court of Human Rights pays close attention to its prior decisions and frequently places emphasis on its consistent jurisprudence.[62] However, it does not treat its prior decisions as binding precedents. Rather, while generally affording respect to these decisions, it interprets the Convention as a "living instrument", to be interpreted "in the light of present day conditions".[63]

When faced with issues arising under the Convention or analogous issues arising under the Constitution, the jurisprudence of the ECtHR has come to play an important role in the Irish courts' decision-making process. However, the effect or influence of the ECtHR's jurisprudence very much depends on the attitude of the

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[61] [2008] 4 IR 117, at 145 (per Fennelly J.).

[62] Mowbray, "An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case Law" (2009) 9(2) *HRLR* 179. See also Lupu and Voeten, "Precedent on International Courts: A Network Analysis of Case Citations by the European Court of Human Rights" (2010) *APSA Annual Meeting Paper*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1643839 (last accessed 19 October 2010) (concluding that the Court cites precedent based on the legal issues in the case, not the country of origin, and that it is more careful to embed judgments in its existing case law in more politically sensitive decisions and decisions relating to common law systems).

[63] See e.g. *Öcalan v Turkey* (2005) 41 EHRR 45, at para. 163.

Irish courts and their willingness to engage with that jurisprudence, something which has evolved dramatically over time and, indeed, continues to evolve. Until the enactment of the European Convention on Human Rights Act in 2003, the ECHR had no formal status in Irish law by reason of Article 29.6.

The evolving attitude is especially clear from an examination of two high-profile cases concerned with Article 8 ECHR. In *Norris v. A.G.*,[64] the Supreme Court was asked to declare the Offences Against the Person Act 1861, which criminalised homosexual conduct between adult males, unconstitutional. In his argument, the plaintiff relied on the decision of the European Court of Human Rights in *Dudgeon v. United Kingdom*,[65] in which the Court had found the same legislation operating in Northern Ireland to be in violation of the applicant's right to a private life under Article 8 ECHR. However, in coming to its decision, the Court firmly refused to draw any guidance from this decision. O'Higgins C.J., for the majority rejecting the plaintiff's claim, stated:

> Neither the Convention on Human Rights nor the decision of the European Court in *Dudgeon v. United Kingdom* is in any way relevant to the question which we have to consider in this case.[66]

Henchy J., dissenting, took the same view:

> Notwithstanding the submission of the plaintiff's counsel to the contrary, the constitutional question that calls for resolution is unaffected by the fact that the precise statutory provisions in question in this case were held by the European Court of Human Rights in *Dudgeon v. United Kingdom* to be in breach of article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. That Convention, as has been held by this Court, although it has by its terms a binding force on the Government of this State as one of its signatories, forms no part of the domestic law of this State. Moreover, article 8 of the Convention has no counterpart in our Constitution.[67]

Ultimately, of course, in *Norris v. Ireland*,[68] the European Court of Human Rights, following *Dudgeon*, found the legislation to be in violation of Article 8 ECHR.

More recently, in the *Foy* case,[69] the High Court, now operating under the European Convention on Human Rights Act 2003 and drawing inspiration from the

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[64] *Norris v. A.G.* [1984] IR 36.
[65] *Dudgeon v. United Kingdom* (1982) 4 E.H.R.R. 149
[66] [1984] IR 36, at 67.
[67] [1984] IR 36, at 68-9.
[68] *Norris v. Ireland* (1991) 13 EHRR 186.

European Court's decision in *Goodwin v. United Kingdom*,[70] declared the Irish statutory regime, which fails to make provision for the amendment of birth certificates to recognise the gender of transgender persons, to be incompatible with Article 8 ECHR. No doubt anticipating the inevitable outcome of possible recourse to Strasbourg (and possibly in part to avoid the unnecessary burdening of an already overloaded Supreme Court docket, something which has given rise to concern in the ECHR system in the context of the Article 6 cases discussed above), the Government announced its intention to withdraw its appeal of the High Court decision and its intention to introduce legislation to remedy the position in Irish law.[71]

While the Irish courts initially displayed some hesitancy or reluctance to consider ECtHR jurisprudence, citation of, and reliance on, ECtHR has, over time, become an increasingly familiar part of Irish jurisprudence. The courts have drawn heavily upon the ECtHR jurisprudence in the interpretation of fundamental rights under the Irish Constitution. What was described in 1999 as "a firm effort to ensure, where appropriate, that constitutional interpretation accords with both the ECHR and the latest Strasbourg thinking",[72] was considered by 2004 to be a "well-established" practice.[73] More generally, the courts have also been strongly influenced by the methodology of the ECtHR's rights jurisprudence, for example, in the use of proportionality analysis to determine the limits which may be placed on individual rights.[74]

Moreover, since the coming into force of the European Convention on Human Rights Act 2003, the courts have a statutory mandate to look to the jurisprudence of the ECtHR, as the High Court did in the *Foy* case. Section 4 of the Act of 2003 provides for judicial notice to be taken of the Convention provisions and any decisions of the Court, the now defunct Commission, or the Committee of Ministers.[75] When interpreting and applying the Convention provisions, the courts

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[69] *Foy v An t-Ard Chlaraitheoir* [2007] IEHC 470.
[70] *Goodwin v. United Kingdom* (2002) 35 EHRR 18
[71] See Smyth, "Appeal against transgender ruling withdrawn", *Irish Times* (22 June 2010).
[72] Hogan, "The Belfast Agreement and the Future Incorporation of the European Convention on Human Rights in the Republic of Ireland" *(1999)* Bar Review 205.
[73] Hogan and Whyte eds, *JM Kelly: The Irish Constitution* (4th ed, LexisNexis Butterworths, 2004), para. 1.1.70.
[74] See *Heaney v. Ireland* [1994] 3 IR 593 where Costello J. relied on a number of decisions of the European Court of Human Rights as well as the decision of the Supreme Court of Canada in *R. v. Chaulk* (1990) 3 SCR 1303. See also Hogan, "The Constitution, Property Rights and Proportionality" (1997) 32 *Ir Jur* 373 and Hogan and Whyte eds, note 62, at paras. 7.1.56 *et seq.*
[75] The precise terms are as follows: "(a) any declaration, decision, advisory opinion or judgment of the European Court of Human Rights established under the Convention on any question in respect of which that Court has jurisdiction, (b) any decision or opinion of the European Commission of Human Rights so established on any question in respect of which it had jurisdiction, (c) any decision of the

shall "take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgments." As discussed in Chapter 3, there are clear limits to the courts' jurisdiction under the ECHR Act 2003. However, the Act generally, and section 4 specifically, contributes to the creation and consolidation of a culture of openness to, and engagement with, the jurisprudence of the ECtHR.

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In conclusion, the decisions of the ECtHR, even in cases to which the State is a party, have no direct or binding effect in Irish law. In practice, adverse decisions of the ECtHR against the State, which must be complied with as a matter of international law, are given effect through a range of legislative or administrative measures. However, the attitude of the Irish courts to these decisions, as well as to the ECtHR's jurisprudence more generally, has evolved considerably over time and, copperfastened by the ECHR Act 2003 and developments in the EU, the ECtHR jurisprudence will continue to exercise great influence within the Irish legal system.

B. Decisions of Other Human Rights Bodies

While the State has also accepted the jurisdiction of a range of other international judicial or quasi-judicial bodies, it is still rare both for the State to be a party to cases before such bodies and for the jurisprudence of such bodies to be relied upon before the Irish courts. In addition to the cases before the European Court of Human Rights, there have also been a number of cases taken against the State before other monitoring bodies established by human rights treaties.[76] However, in contrast to the European Court, these bodies are not fully-fledged judicial or quasi-judicial tribunals and their decisions are not binding on the State as a matter of international law.

i. Conclusions of the European Committee on Social Rights

The revised European Social Charter, the sister convention of the ECHR protecting social and economic rights, established the European Committee on Social Rights to monitor compliance with its provisions by means of periodic national reports and a collective complaints procedure created by the 1995 Additional Protocol to the

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Committee of Ministers established under the Statute of the Council of Europe on any question in respect of which it has jurisdiction"

[76] See the UN human rights online database at http://tb.ohchr.org (last accessed 24 October 2010), which records, for instance, five petitions ('communications') against Ireland to the Human Rights Committee under the First Optional Protocol to the ICCPR.

Charter. In cases where the Committee finds there to have been a violation of the Charter on the basis of a collective complaint, the Committee of Ministers adopts a recommendation which is addressed to the State concerned. However, the "conclusions" of the Committee do not constitute a binding decision even under the terms of the Charter itself. In a recent case, *World Organisation against Torture (OMCT) v. Ireland*,[77] one of four similar cases taken against parties to the Charter, the applicant asked the Committee to rule that Ireland had failed to comply with Article 17 of the Revised European Social Charter "on the grounds that the corporal punishment of children in the home, in foster care, in residential homes and in the care of certain childminders is not prohibited". The Committee concluded that there had been a violation of Article 17. In its response to the Committee of Ministers, the Government indicated that ending physical punishment formed part of its national children's strategy and that the law was being kept under review. The Committee of Ministers then adopted a resolution "noting the intention of the Government to keep the introduction of an outright ban on corporal punishment under review".[78] Thus, in contrast to the adverse rulings of the ECtHR, the decision did not of itself result in law reform. Nevertheless, it did serve to draw political attention to the issue and require the State to articulate its position.

ii. Views of the United Nations Human Rights Committee

A similar type of decision to that of the European Committee on Social Rights is that of the Human Rights Committee established by the International Covenant on Civil and Political Rights on individual petitions or 'communications' received under the First Optional Protocol to the Covenant. In *Kavanagh v. Governor of Mountjoy Prison*,[79] the applicant sought to challenge his conviction for certain offences before the Special Criminal Court on the basis of the 'views' of the Human Rights Committee on his communication, which were to the effect that the State had failed to demonstrate that the decision to try the applicant before that Court was based on reasonable and objective grounds, in violation of his right under Article 26 of the Covenant to equality before the law and to equal protection of the law. The First

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[77] *World Organisation against Torture (OMCT) v. Ireland* (2006) 43 EHRR SE12.

[78] "Ireland's response to the complaint was considered by the Committee of Ministers and Deputies and a resolution was adopted by the Committee of Ministers on 8 June 2005 noting, inter alia, the intention of the Government to keep the introduction of an outright ban on corporal punishment under review…": 605 Dáil Debates 211 (23 June 2005).

[79] *Kavanagh v. Governor of Mountjoy Prison* [2002] 3 IR 97.

Optional Protocol is laconic as to the effects of the Committee's views, merely providing in Article 5(4) that the Committee "shall forward its views to the State Party concerned and to the individual". However, where it has made a finding of a violation of the Covenant, the practice of the Committee, acting on the basis of the guarantee of an effective remedy under Article 2(3) of the Covenant, is to invite the State concerned to provide information, within three months, on the steps it has taken to give effect to the Committee's views.

In *Kavanagh*, Finnegan J. in the High Court observed that the Committee's views did not constitute "a legally binding decision"[80] and, in argument on appeal to the Supreme Court, counsel for the applicant conceded that this was so.[81] The Supreme Court rejected the argument that Article 29.2 permitted the applicant to invoke the Committee's views in order to challenge his conviction by the Irish courts on the basis that this would violate Article 34.1 of the Constitution.[82] Fennelly J. continued:

> The notion that the "views" of a Committee, even of admittedly distinguished experts on international human rights, though not necessarily lawyers, could prevail against the concluded decision of a properly constituted court is patently unacceptable. To be fair, even in international law, neither the Covenant nor the Protocol make such a claim. Neither the Covenant nor the Protocol at any point purports to give any binding effect to the views expressed by the Committee. The Committee does not formulate any form of judgment or declare any entitlement to relief. Its status in international law is not, of course, a matter for this court. It suffices to say that the applicant has not furnished any arguable case for the effect of the Committee's views.[83]

In *Kavanagh*, the plaintiff clearly sought to rely on the views of the Committee (and, as discussed in Chapter 4, customary international law) to circumvent the Court's own jurisprudence, which had rejected a challenge to the constitutionality of the relevant legislation in an earlier decision,[84] and in doing so, to seek the quashing of his conviction, "substantive relief of a far-reaching kind".[85] However, this does not

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[80] [2002] 3 IR 97, at 103, citing academic authority which in turn cited the drafting work for the Protocol.
[81] [2002] 3 IR 97, at 114 (arguing however that by inference the State had agreed to the decision-making mechanism and thus to give effect to its outcome).
[82] [2002] 3 IR 97, at 127.
[83] [2002] 3 IR 97, at 127.
[84] *Kavanagh v. Ireland* [1996] 1 IR 321.
[85] [2002] 3 IR 97, at 128. Subsequent to the Committee's finding, Mr. Kavanagh had been offered financial compensation but instead initiated these proceedings. His subsequent claim before the

mean that the views of the Human Rights Committee could not serve, in appropriate cases, as persuasive authority on the interpretation of fundamental rights common to the 1937 Constitution, the ECHR and the ICCPR.

C. Decisions of Other International Tribunals

In relation to the effect of the decisions of other international tribunals, there is little relevant practice.[86] However, it is clear that the principles governing the implementation of the decisions of the European Court of Human Rights would apply in equal measure to those decisions. Although such decisions would not enjoy any direct or binding effect within the Irish legal system, they might well enjoy persuasive authority in cases where the Irish courts are faced with analogous legal issues.

Decisions of the International Court of Justice have been cited before the Irish courts on occasion.[87] Although formally, in accordance with Article 59, such decisions bind only the parties to them in respect of the particular cases, "a general desire for consistency and stability"[88] can be seen in the Court's case-law, which also commands a high level of respect within the international community generally. The Irish courts have referred to the jurisprudence of the International Court on a number of occasions: for example, in *Re Article 26 and the Criminal Law Jurisdiction Bill 1975*, the Supreme Court cited the *Lotus* decision of the Permanent Court of International Justice as authority for the power of States to legislate with extra-territorial effect provided that the enactment bears on the peace, order and good government of the legislating State.[89]

Committee that Ireland had failed to provide him with an adequate remedy in respect of the initial finding was rejected: see Ireland's Third Periodic Report to the Human Rights Committee (CCPR/C/IRL/3), paras. 624-625, available at http://www2.ohchr.org/english/bodies/hrc/hrcs93.htm (last accessed 24 October 2010).

[86] Although Ireland has not been a party to any cases before the International Court of Justice, it has been a party to a number of cases before international arbitral tribunals (established under the OSPAR Convention and Annex VII of the United Nations Convention on the Law of the Sea) in the context of its dispute with the United Kingdom over the MOX Plant in respect of which the Court of Justice ultimately found that Ireland had failed to fulfill its obligations under the Treaties: C-459/03 *Commission v. Ireland* [2006] ECR I-4635.

[87] See e.g. *McGimpsey v. Ireland* [1988] IR 567; [1990] 1 IR 110; *Horgan v. An Taoiseach* [2003] 2 IR 468.

[88] Rosenne, *The Law and Practice of the International Court 1920-1996: Volume III – Procedure* (The Hague, 1997), at 1610, cited in Boyle and Chinkin, note 4, at 293. See generally Shahabuddeen, note 15.

[89] [1977] IR 129, at 149. Bringing together the two subsidiary means of Article 38(1)(d), the Court relied on O'Connell, *International Law: Volume II* (2nd ed) for this reference. More recently, in *K(TB) v Refugee Appeals Tribunal* [2010] IEHC 142, Edwards J. referred to the *Nottebohm* case (*Liechtenstein v Guatemala* (1955) ICJ Reports 4) in its review of the parties' arguments on the issue

As with all judicial decisions, the degree of persuasive authority of international judicial decisions will depend on a wide range of factors. While the issues they deal with may sometimes be novel, unfamiliar or difficult for national courts, judges must nonetheless engage with the reasoning of these decisions in order properly to determine their authority. As Schreuer summarises the domestic judge's task:

> Only by locating international judicial precedent in the wider framework of international communication, by examining its true relevance to the case before him and by appraising its intrinsic value will he be able to do justice to its importance as a means for guidance and a source of enlightenment. In doing so he will be able to exercise his proper judicial discretion by choosing the solution that is most rational and best in accordance with contemporary international authority...[90]

The reliance in *Kavanagh* on the dissenting opinion of Judge Tanaka in the *South West Africa Case* decided by the International Court of Justice is an example of the need for caution in the use of international judicial decisions: while the fact that it was a dissent is certainly not of itself a reason to deprive an individual opinion of persuasive authority, it is important that such individual opinions are understood within the broader context of the cases in which they are decided in order to truly assess their precedential value.[91]

D. Assessment

As this review makes clear, international judicial decisions have no direct or binding effect within the Irish legal system. Decisions against the State, with which the State is bound to comply as a matter of international law, such as those of the European Court of Human Rights, are generally given effect through legislative or administrative reform. More generally, although they do not have any binding effect *per se*, international judicial decisions may enjoy a high degree of persuasive authority, even in interpreting fundamental rights guarantees under the Irish Constitution, as exemplified by the ECtHR jurisprudence. In practice, therefore, such decisions are often far more significant than their classification as "subsidiary means" for determining international law might suggest. However, the degree of

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of nationality in the context of an application for judicial review of a decision of the Refugee Appeals Tribunal.

[90] Schreuer, "The Authority of International Judicial Practice in Domestic Courts" (1974) 23 *ICLQ* 681, at 708.

[91] [2002] 3 IR 97, at 114 (argument) and 122 (Fennelly J.).

persuasive authority depends on a wide range of factors, including the status of the tribunal, the cogency of its reasoning, its reception by other tribunals, as well as the degree to which Irish courts are willing to engage with the substance and reasoning of those decisions. Although increased openness on the part of the courts to international judicial decisions may reduce the risk of the State being found in violation of its international obligations, in their consideration of such authorities, the courts must at the same time be careful to respect the constitutionally ordained separation of powers.

IV. IMPLEMENTATION IN THE EUROPEAN UNION LEGAL SYSTEM

Although the European Union is not eligible to become a party to the Statute of the International Court of Justice and is not yet a party to the European Convention on Human Rights, international dispute settlement, as Rosas observes, "has become an important part of the EU's external relations agenda".[92] First, the European Union has become a party to, and an active player in, international dispute settlement mechanisms, perhaps most importantly the Dispute Settlement Understanding of the World Trade Organization (WTO). Secondly, in an age of proliferation of international tribunals, the European Court of Justice, itself a tribunal established by treaty, has been called upon to determine its relationship with other international tribunals,[93] as evidenced by the recent *MOX Plant* case.[94] Thirdly, as the case-law of the growing body of international tribunals has emerged, the EU courts have also had to address the status of the decisions of international tribunals within the EU legal system. In short, the EU legal system has frequently had to engage with international tribunals and their decisions. This section will focus on the implementation of the decisions of two international tribunals within the EU legal system, those arising under the WTO DSU and the ECtHR.

A. WTO Dispute Settlement Understanding

The Dispute Settlement Understanding (DSU), which forms part of the WTO Agreements, is one of the most important international dispute settlement mechanisms to which the EU and its Member States are parties. Since its coming into force, the EU has been a frequent litigant under the DSU.[95] While concluded as a mixed agreement in the wake of Opinion 1/94,[96] the EU now enjoys exclusive

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[92] Rosas, "The European Union and International Dispute Settlement" in Boisson de Chazournes, Romano & McKenzie eds, *International Organizations and International Dispute Settlement: Trends and Prospects* (Hotei Publishing, 2002), at 70.
[93] See e.g. Higgins, note 3, and Bronckers "The relationship of the EC courts with other international tribunals: non-committal, respectful or submissive?" (2007) 44 *CMLR* 601.
[94] C-459/03 *Commission v. Ireland* [2006] ECR 2006 I-4635.
[95] The WTO website lists 82 cases in which the EU has been complainant, 72 cases as respondent and 98 cases as third party: http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last accessed 25 October 2010).
[96] Opinion 1/94 [1994] ECR I-5267.

competence over the fields governed by the relevant WTO Agreements.[97] DSU rulings bind both EU and Member States.[98]

i. Decisions to which the EU is a Party

Where there is a dispute between parties to the WTO Agreements, which cannot be resolved by the parties through consultations,[99] the dispute may be referred to a panel established by the Dispute Settlement Body (DSB), which is composed of representatives from each party to the WTO Agreements. The panel will then issue a report on the dispute. In cases where the parties do not accept the report of the panel, they can appeal to the Appellate Body, a standing body comprised of international trade law experts. In accordance with Article 19(1) DSU, where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, "it shall recommend that the Member concerned bring the measure into conformity with that agreement". In order to take effect, the panel report or, in cases of appeal, the Appellate Body's report must then be adopted by the DSB. In contrast to the system which prevailed under the GATT, these reports are adopted unless all States agree to the contrary, the so-called reverse consensus set out in the DSU.[100] Article 21(1) DSU provides that "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members".[101] Once the report is adopted, the DSU gives the party found to be in default a reasonable period of time within which to give effect to the rulings of the

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[97] Article 3(1)(e) and Article 207(1) TFEU.

[98] As Lavranos notes, "if the EC is involved as an applicant or respondent party in a dispute that falls within its exclusive competence for external trade matters… the dispute settlement report is addressed to the EC only but is binding on the EC as well as on its Member States": see Lavranos, *Legal Interaction between Decisions of International Organizations and European Law* (Europa, 2004), at 132. On the question of responsibility under the WTO Agreements, see the discussion in Kuijper, "International Responsibility for EU Mixed Agreements" in Hillion and Koutrakos eds, *Mixed Agreements Revisited: the EU and its Member States in the World* (Hart Publishing, 2010), at 213-214 (noting the controversy in relation to the 'LAN case' (*European Communities — Customs Classification of Certain Computer Equipment*, WT/DS62, 67, 68) in which the US sued both the EC as well as Ireland and the United Kingdom).

[99] Article 4, DSU.

[100] Articles 16(4) and 17(14) DSU.

[101] Contrast Article 46(1) ECHR. See Bourgeois, "The European Court of Justice and the WTO" in Weiler ed, *The EU, the WTO and the NAFTA* (Oxford, 2001), at 109-110: "The negotiations on the dispute settlement system illustrate this. At the end of the dispute settlement process, there can no longer be any doubt about the precise substantive scope of a Member's obligation. Yet, no agreement could be found on a provision entitling a Dispute Settlement Body to recommend to a Member how it should comply in bringing its measures into conformity with WTO rules: a panel or the Appellate Body may only 'suggest' ways to do so. There is thus no GATT/WTO obligation that would require the ECJ to grant 'direct effect' to GATT/WTO rules".

panel and/or Appellate Body.[102] If the report is not implemented within this time period, the parties are required to negotiate compensation pending the report's full implementation.[103] If there is no agreement on compensation, the DSB may authorise retaliatory measures.[104] While the DSU clearly requires compliance with its rulings, the precise status of a DSB ruling as a matter of international law has been the subject of some controversy.[105]

In the wake of a number of adverse rulings against the EU, litigants, adversely affected by retaliatory trade measures taken by the other party to the dispute, have sought to rely on the DSB rulings which find the EU in breach of the WTO Agreements in order to challenge the relevant EU legislation before the European courts or in order to seek compensation for losses suffered as a result of the continuation in force of that legislation. In making such arguments, litigants have faced a major obstacle in the form of the jurisprudence denying the direct effect of the WTO Agreements and refusing to allow challenges to the validity of EU legislation based on those Agreements except where it is clear that the relevant legislation was intended to implement the particular obligation under those Agreements or it expressly referred to the Agreements.[106] In the face of this jurisprudence, it has been argued, with some academic and judicial support,[107] that DSB rulings should be given direct effect because, once the time period for implementation has passed, they embody a definitive finding that the relevant EU legislation is in breach of the Agreements.

While the Court of Justice was initially able to avoid addressing this issue in *Biret*,[108] in later cases it has consistently refused to give effect to DSB rulings. In *Van Parys*,[109] which arose out of the longstanding bananas trade dispute,[110] the applicant sought to rely on the WTO Agreements and the DSB rulings to challenge EC legislation adopted in the aftermath of the initial DSB ruling which had found the EC in breach of the Agreements. Subsequently, in further proceedings under the

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[102] Article 21.3 DSU.
[103] Article 22.2 DSU.
[104] Article 22 DSU.
[105] See e.g. Jackson, "International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"?" (2004) 98 *AJIL* 109. See also C-120/06 P and C-121/06 P *FIAMM and FIAMM Technologies* [2008] ECR I-6513, at para. 129.
[106] See Chapter 3, Section IV.C.iii.a.
[107] See e.g. Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford University Press, 2004), at 299 (referring to Advocate-General Alber's "strong case" for direct effect).
[108] Case C-94/02 P *Biret* [2003] ECR I-10565.
[109] C-377/02 *Van Parys* [2005] ECR I-1465.
[110] For an overview, see Eeckhout, note 96, at 381-393.

DSU, this legislation was also found to be incompatible with the Agreements and an another amending regulation was adopted to bring the EC into conformity with the Agreements. In this context, the Court confronted the question as to whether an applicant could rely on the WTO Agreements to challenge the validity of EU legislation "where the DSB has held that both that legislation and subsequent legislation adopted by the Community in order, *inter alia*, to comply with the relevant WTO rules are incompatible with those rules".[111] The Court rejected this argument, stating that, by undertaking to comply with WTO rules after the adoption of the relevant DSB ruling, "the Community did not intend to assume a particular obligation in the context of the WTO, capable of justifying an exception to the impossibility of relying on WTO rules before the Community Courts and enabling the Community Courts to exercise judicial review of the relevant Community provisions in the light of those rules".[112] The Court then outlined the features of the DSB which accorded importance to negotiations between the parties, even following a DSB ruling,[113] and held that requiring the courts to refrain from applying rules of domestic law which are incompatible with the Agreements "would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 of that memorandum of reaching a negotiated settlement, even on a temporary basis".[114] Referring to the series of events which occurred following the DSB rulings in the instant case, the Court expressed the view that judicial review of the lawfulness of measures in light of the WTO rules even after the expiry of the time-limit for compliance with the DSB rulings "could have the effect of undermining the Community's position in its attempt to reach a mutually acceptable solution to the dispute in conformity with those rules".[115] Thus, the Court's decision to refuse judicial review is clearly based on concerns relating to the appropriateness of its assertion of jurisdiction in light of its potential effect on the political organs of government in their external relations.

In *FIAMM*,[116] yet another case arising out of the bananas dispute, the applicants exported goods to the US, which were the subject of trade sanctions imposed by the US as retaliatory measures under the DSU. The applicants sought damages against the Council and the Commission on the basis of their non-

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[111] [2005] ECR I-1465, at para.38.
[112] [2005] ECR I-1465, at para.41.
[113] *Ibid.*, at paras. 42-47.
[114] *Ibid.*, at paras. 48.
[115] *Ibid.*, at paras. 51.
[116] C-120/06 P and C-121/06 P *FIAMM and FIAMM Technologies* [2008] ECR I-6513.

contractual liability for unlawful or, in the alternative, lawful conduct in failing to bring EC legislation into line with WTO requirements within the time period laid down by the DSB. Both the Court of First Instance and, on appeal, the Court of Justice rejected their claims. The applicants argued for a third exception to the rule excluding direct effect of WTO Agreements in the context of DSB rulings the time-limit for compliance with which had expired. However, the Court considered that its holding in *Van Parys* – that the WTO rules, which the DSB ruling had found to have been infringed, could not be relied upon before the European courts for the purpose of reviewing the legality of the conduct of the Community institutions even after the time period for implementation had expired – "necessarily excluded such a review in the light of the DSB decision itself".[117] This was because the DSB decision, which had no other object than to rule on the consistency of a party's conduct with its obligations under the WTO, could not be "fundamentally distinguished from the substantive rules which convey such obligations".[118] Thus, "whatever the precise legal effect attaching to such a recommendation or ruling", a recommendation or ruling of the DSB finding that the substantive rules in the WTO Agreements had not been complied with, was "no more capable than those rules of conferring upon individuals a right to rely thereon before the Community courts for the purpose of having the legality of the conduct of the Community institutions reviewed".[119]

The reasoning of the Court again echoed its reasoning on the issue of the direct effect of the WTO Agreements themselves, albeit with more focus on the specific provisions of the DSU.[120] It noted that considerations linked to the nature of the WTO Agreements and their "reciprocity and flexibility" remained relevant even after the time period had expired for the implementation of a DSB ruling.[121] The EU institutions still enjoyed "an element of discretion and scope for negotiation vis-à-vis their trading partners with a view to the adoption of measures intended to respond to the ruling or recommendation, and such leeway must be preserved".[122] Moreover, because Article 3(2) of the DSU provided that its rulings could not "add to or diminish the rights and obligations provided in the agreements concerned",[123] the Court stated that it followed that an adverse DSB ruling could not have "the effect of

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[117] *Ibid.*, at para. 127.
[118] *Ibid.*, at para. 128.
[119] *Ibid.*, at para. 129.
[120] See Chapter 3, IV.C.iii.
[121] *Ibid.*, at para. 128.
[122] *Ibid.*, at para. 130.
[123] *Ibid.*, at para. 131.

requiring a party to the WTO agreements to accord individuals a right" which they did not enjoy by virtue of the Agreements in the absence of such a decision.[124] Accordingly, the European courts could not "in the circumstances of the case in point, review the legality of the conduct of the Community institutions in the light of WTO rules".[125] While the Court's approach has attracted strong criticism,[126] it must be noted that compliance with DSB rulings generally requires amendment of EU law, something which is more properly a matter for the EU's legislative organs.

ii. Jurisprudence under the DSU generally

If DSB rulings are not recognised as enjoying direct effect, the question arises as to what authority, if any, they enjoy in the EU legal system. While the WTO panels and Appellate Body do not operate a system of binding precedents, as its jurisprudence has developed, in line with other tribunals, the Appellate Body's interpretation of the WTO Agreements in its previous decisions has come to exercise considerable precedential authority in practice.[127]

The European courts have sometimes relied on decisions of the Appellate Body when interpreting the provisions of the WTO Agreements.[128] While the Court has clearly rejected the direct effect of the WTO Agreements, it may nevertheless be required to interpret them in a number of contexts, cases coming within the *Fediol* and *Nakajima* exceptions being perhaps the most obvious example.

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[124] *Ibid.*

[125] *Ibid.*, at para. 133.

[126] See e.g. Dani, "Remedying European Legal Pluralism: The *FIAMM* and *Fedon* Litigation and the Judicial Protection of International Trade Bystanders" (2010) 21 *EJIL* 303. See also the comments of Lavranos: "Accordingly, the ECJ prefers to uphold a situation that violates the Rule of Law and is disadvantageous to undertakings and consumers, rather than taking final, legally binding WTO reports into account in its jurisprudence, thereby giving them the legal effect they deserve within the Community legal order": Lavranos, note 87, at 5.

[127] See, for the example, the statement in the following Appellate Body Report, *US - Stainless Steel*, WT/DS344/AB/R, at para. 160: "Dispute settlement practice demonstrates that WTO Members attach significance to reasoning provided in previous panel and Appellate Body reports. Adopted panel and Appellate Body reports are often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes. In addition, when enacting or modifying laws and national regulations pertaining to international trade matters, WTO Members take into account the legal interpretation of the covered agreements developed in adopted panel and Appellate Body reports. Thus, the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system. Ensuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case." See David, "The Role of Precedent in the WTO - New Horizons?" *Maastricht Faculty of Law Working Paper* (2009/12).

[128] See e.g. C-245/02 *Anheuser-Busch* [2004] ECR I-10989, at paras. 49 and 67, and Case T-274/02 *Ritek Corp.* [2002] ECR II-4305, at paras. 104-107.

In certain cases, even where the courts have not explicitly followed DSB rulings, their conclusions clearly betray the influence of the reasoning of those rulings. Thus, for example, in the *IKEA Wholesale* case,[129] the Court was asked to consider the validity of an EC antidumping measure which had earlier been found by the WTO to be incompatible with the WTO Anti-dumping Agreement.[130] While the Court refused to consider the validity of the measure in the light of the WTO Anti-dumping Agreements, it nonetheless came to the same conclusion as the Appellate Body. As Bronckers has stated, "it seems a safe assumption that the European Court's interpretation of EC law was influenced by the disapproval of the same EC measure by the WTO Appellate Body".[131] Lavranos has gone further, describing this as "the ECJ exceptionally [having given] effect to the Appellate Body report, albeit without admitting it".[132] Referring to further examples of this influence,[133] Bronckers concludes that "the dialogue of the European courts with WTO tribunals, while muted to date, does exist".[134]

While the precise degree of respect to which the European courts affords to WTO jurisprudence will become clearer over time and even then will vary from case to case, it is clear that the European courts will inevitably be called on to engage directly and indirectly with this evolving jurisprudence, as similar issues, albeit in different forms, come before both bodies.

B. European Court of Human Rights

In contrast to the WTO DSU, to which the EU, along with Member States, is a party, the EU is not a party to, and thus is not directly bound by, the European Convention on Human Rights. It follows that there is no question of the decisions of the ECtHR having direct effect within the EU legal system. However, as the EU has evolved, it has recognised the special significance of the Convention to which it is currently negotiating its accession, on the basis of the new Article 6(2) TEU. Having regard to the extensive literature on the EU and the ECHR, this section seeks simply to provide a short overview of its effect within the EU legal system.

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[129] Case C-351/04 *IKEA Wholesale* [2007] ECR I-7723.
[130] Appellate Body Report, *EC – Bed Linen*, WT/DS141/AB/R.
[131] Bronckers, "From Direct Effect to Muted Dialogue?: Recent developments in the European Courts' case law on the WTO and beyond" (2008) 11 *Journal of International Economic Law* 885.
[132] Lavranos, "The ECJ's relationship with other international courts and tribunals", available at papers.ssrn.com/sol3/papers.cfm?abstract_id=1672727 (last accessed 25 October 2010).
[133] Case C-310/06 *FTS International* [2007] ECR I-6749.
[134] Bronckers, note 120, at 890.

Although it is not a party to the ECHR, from an early stage, the Court of Justice recognised the importance of the Convention as a source of inspiration for the protection of fundamental rights as part of the general principles of EU law.[135] Reflecting these developments in the case-law, the Treaties eventually made express reference to the Convention, initially in the preamble to the Single European Act and later in a provision in the Maastricht Treaty. As currently embodied in Article 6(2) TEU, this provides that fundamental rights, "as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States", constitute general principles of the Union's law. As Eeckhout has pithily put it, the Convention "is for practical purposes part of Community law and can be invoked in the Court of Justice and national courts where Community law is in issue, particularly where Member States implement Community law".[136] While decisions of the ECtHR do not formally bind the EU,[137] they exercise a high degree of persuasive authority within the EU legal system.

Lavranos has defined the effect of this approach in the following terms, stating that the Court of Justice "actively communitarizes the ECHR and the case-law of the ECrtHR and thereby upgrades them to the highest norm in the domestic legal order of the EU Member States...".[138] Thus, there is a major discrepancy between the formal status of the Convention and the reality of its effect within the EU legal system. Indeed, notwithstanding that it was Ireland, and not the EU, which is a party to the Convention, the Convention arguably enjoyed greater force within the EU legal system than in the Irish legal system, at least prior to the ECHR Act 2003.

As the competence of the EU has expanded and it has extended its reach into ever-more fields of activity, issues touching upon EU law and the EU legal system have come before the ECtHR. Although many such cases have come before the ECtHR,[139] one of the most interesting examples of this is the case of *Bosphorus v.*

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[135] For a brief history, see Chalmers, Davies and Monti, note 23, at 232-236.
[136] Eeckhout, note 96, at 445.
[137] For contrary views on divergences between the Strasbourg and Luxembourg jurisprudence on fundamental rights, see Rosas, "The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue", (2007) 1 *EJLS* 10, at 10 and Lavranos, note 121, at 6-9.
[138] Lavranos, note 87, at 186.
[139] See e.g. Application No.17862/91, *Cantoni v France*, November 15, 1996; *Matthews v United Kingdom* (1999) 28 EHRR 361; *Senator Lines GmbH v 15 EC Member States* (2004) 39 EHRR SE3. See Clapham, "The European Union before the European Court of Human Rights" in Boisson de Chazournes, Romano and McKenzie eds, note 81, at 73.

Ireland which has been discussed in Chapter 5.[140] For present purposes, it suffices to recall that the applicant, the Turkish lessee of a Yugoslav airplane, having unsuccessfully challenged the application to it of an EU regulation implementing Security Council resolutions against the former Yugoslavia, applied to the ECtHR, claiming the infringement of its right to property. In its decision, the ECtHR conducted a careful examination of the system of protection of human rights within the EU and concluded that this system offered equivalent protection to the Convention system. This equivalent protection gave rise to a presumption that "Ireland did not depart from the requirements of the Convention when it implemented legal obligations flowing from its membership of the EC", which presumption had not been rebutted by the applicant.[141]

While the landscape of human rights protection within the EU has changed as a result of the Treaty of Lisbon, the ECHR will continue to play a central role in that landscape. In addition to Article 6(3) TEU which reaffirms the status of the fundamental rights, as guaranteed by the ECHR, as general principles of Union law, Article 6(2) provides that the EU "shall accede" to the ECHR, although this "shall not affect the Union's competences as defined in the Treaties". Moreover, even though the EU now has its own Charter of Fundamental Rights, an integral part of the Treaties, Article 52(3) shows that the Charter takes the ECHR as an important point of reference.[142] Having regard to the ECtHR's highly developed jurisprudence and the degree to which this has already been subsumed into the ECJ's own jurisprudence, the ECtHR will undoubtedly remain highly influential in the EU legal system. On the conclusion of the accession negotiations currently under way, the formal position of the Convention within the EU legal system is set to change. Moreover, the Court will adjudicate upon, and may give adverse decisions, on cases to which the EU is a party, raising issues analogous to those which have arisen in Ireland in the same context of the ECHR and already in the EU in the different context of the WTO DSU. While the status of such decisions in the EU legal system will have to be worked out in due course, in practice the status of the jurisprudence

[140] *Bosphorus v. Ireland* (2006) 42 EHRR 1.
[141] *Ibid.*, at para. 165-167.
[142] In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

generally, which is already treated as being highly influential, is unlikely to change in any radical way.[143]

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As things currently stand, despite the fact that it does not formally bind the EU, the ECtHR and its jurisprudence has been highly influential in the EU's own developing system of human rights protection. Although the new Treaties establish an elaborate system for the protection of human rights, including the EU's own Charter for Fundamental Rights, and provide for formal accession to the ECHR, it is suggested that the ECtHR jurisprudence will remain a very strong influence on the fundamental rights jurisprudence of the EU courts.

C. Decisions of Other International Tribunals

In addition to the decisions of the WTO and ECtHR, the Court has not infrequently relied on the decisions of other international tribunals,[144] notably the jurisprudence of the International Court of Justice. In particular, as discussed in more detail in Chapter 4,[145] the European courts have placed heavy reliance on decisions of the ICJ in identifying and applying rules of customary international law. Although the EU is not and cannot be a party to the Statute of the International Court of Justice, the European courts have nonetheless recognised the authority of these decisions in their pronouncements, *inter alia*, on the status of particular rules of customary international law. Kuijper has referred to this as being "an interesting example of deference among international courts".[146] This shows once again that international judicial decisions do not need to have a formally binding effect in order to enjoy considerable authority.

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[143] See e.g. Rosas, note 126: "Thus formal EU adherence to the European Convention, envisaged in the mandate for the Reform Treaty currently being negotiated, would not in my view change things radically, although it is of course true that through this device the Convention would as such become an act of Community law rather than a particularly important guideline informing us of the content of the general principles of Community law".

[144] On the EFTA Court, the rulings of which it is not bound to follow, see Bronckers, note 82, at 605 and Bronckers, note 120, at 891. Other instances of recourse to international tribunals include the Swordfish dispute between EC and Chile which was submitted to a special chamber of ITLOS on an ad hoc basis. However, after the settlement of the dispute, proceedings were suspended: see Rosas, note 81, at 60.

[145] Chapter 4.III.E.

[146] See Kuijper, "Customary international law, decisions of international organisations and other techniques for ensuring respect for international legal rules in European community law" in Wouters, Nollkaemper and de Wet eds, *The Europeanisation of International Law: the Status of International Law in the EU and its Member States* (TMC Asser Press, 2008), at 95.

D. Assessment

In conclusion, the effect of international judicial decisions within the EU legal system has a number of unusual features. First, the principal type of international decision binding on the EU which has come before the European courts has been rulings under the WTO Dispute Settlement Understanding. In respect of these decisions, the courts, following their jurisprudence on the status of the WTO Agreements within the EU legal system generally, have refused to give these decisions direct effect. In coming to this conclusion, the European courts have laid strong emphasis on the position of the EU institutions within the DSU (what may be considered political considerations). Secondly, although it is not (yet) a party to the ECHR, the European courts have relied heavily on the jurisprudence of the ECtHR in their construction of the system for the protection of fundamental rights within the EU legal system. They have also relied extensively on the jurisprudence of the International Court of Justice in their identification of customary international law. Thus, in these specific contexts, it could be suggested that international decisions directly binding on the EU enjoy less force within the EU legal system than those which have no such binding effect but nevertheless exercise considerable influence in matters as important as the protection of fundamental rights. While this situation has led one commentator to conclude that "there is simply no room for dialogue and cooperation" between the ECJ and other international tribunals,[147] such a conclusion appears to be unduly pessimistic and fails to take account of the very real dialogue that takes place, directly and indirectly, in all of these areas. Although this dialogue has not always resulted in the European courts ensuring respect for international decisions within the EU legal system, this must be understood within the broader context of the institutional balance within the EU.

V. CONCLUSION

While international judicial decisions are formally regarded as "subsidiary means" of determining international law, the examination of their implementation within the Irish and EU legal systems in this chapter demonstrates the very real practical importance, and the wider influence, of such decisions. Often raising squarely the

[147] Lavranos, note 121, at 16.

issue of international responsibility, such decisions can exert considerable pressure with a view to bringing about the reform and realignment of Irish or EU law with the State's, or the EU's, international obligations. Beyond decisions which specifically bind Ireland or the EU, the jurisprudence of international judicial and quasi-judicial tribunals can also serve as an important influence in the interpretation and development of Irish or EU law.

In the implementation of international judicial decisions, perhaps reflecting their lack of formal status as a source of international law, there is more common ground between the approaches of the Irish and the EU legal systems than in the case of the other sources of international law examined in this thesis. Both systems exclude the direct internal effect of binding decisions of international tribunals yet both acknowledge the strong persuasive authority of the jurisprudence of such tribunals, particularly the ECtHR. Of course, because the ECHR is so influential in the interpretation of fundamental rights both in the Irish and EU legal systems, the jurisprudence of the ECtHR has a special significance in those systems. While the Irish courts were initially reluctant to engage with this jurisprudence, which for a long time arguably enjoyed greater force through EU law than independently in the Irish legal system, recent years have witnessed much more vigorous engagement on the part of the Irish courts with the jurisprudence of the ECtHR, prompted principally by the European Convention on Human Rights Act 2003. In relation to the other main type of decision examined in this chapter, WTO DSB rulings, just as it is the EU which is generally the litigant in such disputes, it is the EU (and specifically the European courts) which determines the effects of such rulings within the EU legal system broadly understood.

On the one hand, despite the lack of direct effect of international judicial decisions, those which bind the State or the EU as a matter of international law have frequently been the trigger for law reform. The approach of both systems to these decisions is best understood in light of the appropriate constitutional roles of different organs of government. If giving effect to such a decision would require a change in the law, this is a matter which first and foremost falls to be undertaken by the legislative organs of government. While the temptation for domestic courts to enforce international judicial decisions may be strong, particularly where there has been a clear finding of a violation of international law, in the absence of an express provision to the contrary in their constitutional law, the courts risk trespassing on to the domain of the legislature in seeking to remedy the State's, or the EU's, default in

its international obligations. On the other hand, the lack of binding effect in no way affects the persuasive and influential authority of international judicial decisions, which is often far-reaching. The extent to which this authority exercises influence depends largely on the degree of openness of individual legal systems and legal cultures. While it can be difficult to define the degree of openness of a legal system, and recent controversies have questioned the European courts' openness to international law,[148] it is suggested that, as a general matter, the EU has directly and indirectly increased the degree of openness of the Irish legal system to international law.

[148] See e.g. de Búrca, "The European Court of Justice and the International Legal Order After *Kadi*" (2010) 51 *Harvard International Law Journal* 1, at 23.

CHAPTER 7.
CONCLUSION

I. Introduction

As Irish society and economy have become increasingly globalised, so too has the Irish legal system. Despite its neglect in Irish legal scholarship,[1] international law has exercised a deep influence on the Irish legal system. The European Union (EU), founded in international law, is the obvious and important example of this influence. Of course, the EU is not merely one instance among many of Ireland's international relations. The European Treaties form an integral part of the Irish constitutional framework and have been the most significant source of change within the Irish legal system since independence, both in terms of substance and structure. Moreover, as the EU has become an increasingly active player in international relations, Ireland has become subject to a growing body of international obligations through the EU.[2] As this has occurred, the role of the EU in the implementation of international law has correspondingly increased. It is this increasing role of the EU in the implementation of international law in the Irish legal system which is at the heart of this thesis.

Although Article 29 of the 1937 Constitution continues to set out the basic framework for the implementation of international law in the Irish legal system, it no longer provides an answer to most of the difficult questions to which that process gives rise. As the EU's competence in external relations developed, the limitations of Article 29 have become increasingly obvious. It is increasingly necessary to turn to the European Treaties, and the expansive jurisprudence on external relations which has developed under the Treaties, to understand the current framework for the implementation of Ireland's international obligations. The approaches adopted by the Irish and EU constitutional systems to the implementation of international law differ in significant respects. The Irish legal system has traditionally been classified as adopting a dualist approach to the implementation of international law. More open to international law in many respects, the EU legal system has often been considered to take a monist approach to the implementation of international law. Thus, the effect

[1] See Chapter 1, Section II.B.
[2] See generally Chapter 2.

of EU membership on the implementation of international law is most pronounced for those Member States with a dualist tradition. While the effect of EU membership in Member States with a tradition of dualism can thus be presented (simplistically, it is suggested) as a clash between monist and dualist approaches, this study of the Irish legal system has sought to show that the effect of EU membership is in fact more complex and profound. Implementation of international law within internal legal systems – invariably touching upon the constitutional allocation of powers and often upon the protection of fundamental rights – raises a host of questions of principle, and of practice, which have come increasingly to the fore as the reach of international law within internal legal systems has extended and the EU's role in that process intensified. For this reason, it is necessary to move beyond the monist-dualist paradigm when engaging with the implementation of international law.

In short, this thesis has two broad conclusions. First, EU membership has had a radical effect on the implementation of international law within the Irish legal system, which can be seen in different ways across all sources of international law. Secondly, this changing framework for the implementation of international law, which brings three distinct but inter-related systems into play, underlines the inadequacy of the doctrines of monism and dualism and calls for new efforts towards better understanding of this process.

II. The Effect of EU Membership on the Implementation of International Law in the Irish Legal System: An Overview

In Chapters 3 to 6, this thesis has examined the implementation of the principal sources of international law in the Irish legal system, broadly understood so as to include the legal system of the European Union of which it now forms an integral part. Because of the limited scholarship on the implementation of international law in the Irish legal system, those chapters have examined in detail the traditional approach to implementation of international law in the Irish legal system as well as the approach in the EU legal system, which has been the subject of much more scrutiny and scholarship. This is the first Irish study to provide a general account and analysis of the implementation of international law within the Irish legal system within the context of EU membership. Although the effect of EU membership on this process varies according to different sources of international law, and sometimes

even within these categories, the increasing direct and indirect influence of the EU is evident across almost all areas of international law.

A. International Agreements

The volume and diversity of international agreements to which Ireland and the EU, independently or jointly, are parties, has given rise to a complex and differentiated regime for the implementation of these agreements within the Irish legal system.

First, where Ireland alone is party to an international agreement, in the diminishing number of areas of international relations unaffected by EU membership, the implementation of such an agreement within the Irish legal system continues to be governed by the clear rule set out in Article 29.6 of the 1937 Constitution according to which no international agreement forms part of Irish law in the absence of legislation.[3]

Secondly, where the EU alone is a party to an international agreement, while the legal status or effect of the agreement may depend on the legal basis upon which it is concluded (for example, whether it is concluded within the CFSP or an area of external action governed by the TFEU), such agreements, upon their conclusion, bind the institutions *and* the Member States and, in accordance with the *Haegeman* doctrine,[4] form an integral part of the EU legal order.[5] Thus, the starting point for the implementation of international agreements within the EU legal system is fundamentally different from that of the Irish legal system. While this does not dispose of the question of their internal legal status, the European courts have in many cases recognised the direct effect of international agreements.[6] In those cases, litigants can rely on such agreements in national courts, even in the face of inconsistent national law. In other words, EU law, not Article 29.6, determines the status of such agreements within the Irish legal system.

Thirdly, and most interestingly, in the significant number of cases where both the Member States and the EU are parties to an international agreement, the position is more complex. Mixed agreements, one of the most distinctive and defining characteristics of EU external relations, cover a broad range of circumstances, one of the most common of which is where the EU and Member States share competence in

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[3] See Chapter 3, Section III.B.
[4] Case 181/73 *Haegeman* [1974] ECR 449.
[5] See Chapter 3, Section IV.A.
[6] See Chapter 3, Section IV.C.ii.

a particular field of external relations.[7] Different elements of such agreements, and their implementation, may fall in part within the respective competences of the EU and of Member States. This presents the possibility of provisions of a mixed agreement enjoying a different status according to whether they fall to be applied and implemented within the EU legal system or in Member States' legal systems. This is exemplified by the case-law on the TRIPS Agreement.[8] However, through its broad assertion of its jurisdiction to interpret EU law in the context of preliminary rulings, as well as its vigorous use of the duty of cooperation laid down in the Treaties in the context of enforcement actions,[9] the European Court of Justice ultimately and effectively determines where competence lies in respect of mixed agreements and, accordingly, whether it is for the European courts or national courts to decide on their internal effect.

Fourthly, there are many international agreements which do not fall neatly into these categories.[10] On the one hand, there are agreements binding on the Member States but not directly on the EU, such as the European Convention on Human Rights and the United Nations Charter. Nonetheless, these agreements may enjoy considerable influence within the EU legal system and the EU may play a role in giving effect to provisions of, or obligations deriving from, those agreements. On the other hand, there are agreements which bind the EU but not Ireland: for example, the Aarhus Convention is binding on the EU and on most Member States but, while signed, has not yet been ratified by Ireland. The EU has, however, given effect to many of its provisions through secondary legislation. Insofar as the Convention enjoys any status in Irish law, therefore, it is through these EU implementing measures.

It is clear that the implementation of international agreements in the contemporary Irish legal system presents a far more complex picture than has traditionally been the case. In the first instance, the approach to implementation depends on the allocation of competence between Member States and the EU in respect of an international agreement. If it falls within the competence of Member States, the provisions of Article 29.6 continue to apply and positive legislative action is required for it to take effect within the Irish legal system. If it falls within the competence of the European Union, the provisions of EU law apply, which recognise

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[7] See Chapter 2, Section III.F.
[8] See Chapter 3, Section IV.B.
[9] Article 4.3 TEU (ex Article 10 TEU).
[10] See Chapter 3, Section IV.C.iii.

an international agreement as forming part of the EU legal order and which often confer direct effect on its provisions. However, as Chapter 3 demonstrated, neither approach is as straightforward as this broad overview suggests: under the Irish constitutional scheme, international agreements, even where they do not form part of Irish law, may nonetheless exert a certain indirect effect or influence;[11] under the EU constitutional scheme, while the direct effect of international agreements has been widely recognised, recent jurisprudence cautions against the commonplace assumption that the WTO Agreements, which do not enjoy direct effect, are an isolated exception.[12] The position is also evolving in nature, as the interaction between EU and Member States is defined and re-defined, not just formally in the Treaties but, just as importantly, in their practice on the international stage. It is not merely a question of the effect of international agreements within the Irish legal system or a question of the clash between so-called monist and dualist approaches, but, more fundamentally, a question of who determines these important questions and at what level. In short, EU membership has had a major impact on the approach to implementation of international agreements within the Irish legal system.

B. Customary International Law

The position in respect of customary international law, reflecting the character of that source, is less clear.[13] In part, this is because the implementation of custom within internal legal systems is by its nature a difficult process. As seen in Chapter 4, a great deal of uncertainty continues to cloud the implementation of custom in both the Irish and EU legal systems. This lack of clarity is also partly a result of the general applicability of custom which means that its rules do not necessarily fall clearly into Member States' or the EU's competence respectively. Even more so than is the case with international agreements, there is no neat delimitation between the EU and Member States.

As emerged in Chapter 4, notwithstanding many areas of uncertainty, custom is recognised as forming part of both the Irish and the EU legal systems without the need for any domestic implementing measures. However, whereas in the Irish legal system custom is relegated to a common law or even sub-common law status, the EU

[11] See Chapter 3, Section III.C.ii.
[12] See Chapter 3, Section IV.C.iii.
[13] See Chapter 4, Section II.

legal system recognises custom as having a status akin to that of general principles of EU law, by reference to which the validity of EU secondary legislation can be challenged. It follows that, insofar as the European courts give effect to a rule of custom, it prevails over inconsistent secondary legislation of the EU and any inconsistent national law. Thus, the hierarchical status of custom varies dramatically between the Irish and EU legal systems.[14]

At the same time, it is important to recognise that both the Irish and EU legal systems, while recognising that custom forms part of the law, place certain limits on its internal application. In the Irish legal system, this takes the form of an emerging but ill-defined doctrine of justiciability by reference to which the Court may refuse to rule on an issue of customary international law on account of its subject-matter.[15] In the EU legal system, this can be seen in the limited scope of judicial review exercised by the Court of Justice in the case of alleged violations of (at least certain rules of) customary international law by the EU, which is confined to reviewing "manifest violations" only.[16]

Although the instances of conflict arising from the different status of custom in the Irish and EU legal systems are likely to be limited in practice, the EU approach to the implementation of custom nonetheless differs significantly from the traditional Irish approach. Indeed, although custom is by its nature a law primarily between States, it may in fact enjoy more force through EU law than independently through Irish law. As issues of customary international law increasingly come before the European courts, the effect of the EU on Member States' approach to custom is likely to increase.[17]

C. Security Council Resolutions

The implementation of UN Security Council resolutions gives rise to distinct issues from those raised by the other sources of international law. As discussed in Chapter 5, the EU is not directly bound by the UN Charter and Security Council resolutions.[18] However, Member States have chosen to act through the EU to give effect to many of those resolutions, notably those imposing economic sanctions. In the case of other types of sanction, Member States continue to enact their own measures to give effect

[14] Within Chapter 4, contrast Section III.D in relation to Ireland with IV.D. in relation to the EU.
[15] Chapter 4, Section III.F.
[16] Chapter 4, Section IV.F.
[17] Chapter 4, Section V.
[18] Chapter 5, Sections IV.A&C.

to the obligations deriving from Security Council resolutions. However, economic and related sanctions are still the most important measure relied on by the Security Council. The procedure for implementing such sanctions in the EU is two-pronged.[19] After first making a unanimous decision to act within the framework of the CFSP, effect is then given to such sanctions through EU regulations, now adopted under the Treaty on the Functioning of the European Union. The EU steps into the shoes of Member States by implementing these resolutions. Where once such resolutions were given effect in Ireland through *ad hoc* measures, often by way of statutory instrument, they are now implemented through an EU instrument that ensures direct applicability, superior effect vis-à-vis contrary domestic law, and uniformity of application and interpretation within all Member States' legal systems. However, as the *Kadi* case confirmed,[20] such instruments were not immune from review on the grounds that they violated fundamental rights. Thus, while the effect of EU membership on the implementation of UN Security Council resolutions is of a different character to its effect in relation to other sources of international law, it is clear that the EU, by facilitating the effective and uniform application of Member States' international obligations, now plays a central role in the implementation of Security Council resolutions within the Irish legal system.

D. International Judicial Decisions

Although they are not one of the traditional sources of international law, and are formally classified as a subsidiary means for the determination of international law, international judicial decisions have come to play an important role in practice in the international legal system.[21] Ireland and the EU are parties to a number of international dispute settlement mechanisms, which provide for recourse to an international tribunal. The effect of decisions of international tribunals is two-fold: first, such decisions are often binding on the parties to the particular dispute (what might be called their binding effect); secondly, in addition to their binding effect, such decisions serve as persuasive authority for other parties, courts and tribunals, international or national, dealing with the similar issues (their persuasive authority). In the implementation of international judicial decisions, there is a high degree of convergence in the approach taken by the Irish and EU legal systems.

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[19] Chapter 5, Section IV.B.
[20] Joined Cases C-402/05P and C-415/05P *Kadi and Al Barakaat* [2008] ECR I-6351.
[21] See Chapter 6, Section II.

International judicial decisions do not enjoy any direct effect in the Irish or EU legal systems even in those cases where they are binding on the State or the EU as a matter of international law, as is clear from the position of ECHR and WTO DSU rulings in the Irish and EU legal systems respectively. In order to give effect to those rulings, political action is generally required. However, even though such decisions may lack binding effect within the Irish and EU legal systems, the jurisprudence of international tribunals may serve an important role in providing guidance to the Irish and European courts and political actors on the determination and interpretation of international law. Insofar as the EU has had an effect on the implementation of international judicial decisions in the Irish legal system, it is of a much more subtle character to that it has had on the implementation of other sources. The culture of EU law, and its openness to the persuasive authority of international jurisprudence, particularly that of the ECtHR, is an example of this more subtle effect;[22] this has been one factor among many in the opening up of the Irish legal system to that jurisprudence.[23]

E. Conclusion

Just as the different sources of international law give rise to different issues in their implementation within internal legal systems, it is not surprising that the effect of EU membership on the implementation of international law within the Irish legal system also varies according to the different sources of international law. However, looking at the picture as a whole, it is clear that EU membership has had a significant effect on the implementation of international law in the Irish legal system. While this study is focused specifically on the effect of EU membership on Ireland, the conclusions which it has reached may undoubtedly be extended not only to the United Kingdom, as another common law system with a dualist tradition, but more broadly to the process of implementation of international law in the legal systems of other Member States which, in their own distinct ways, have been affected by EU membership. While the effect may be less marked in relation to international agreements in States with monist traditions, in all cases, the level at which the ultimate decision is made about the effect or lack of effect of e.g. a mixed agreement is the same. Moreover, the influence of the EU is likely only to increase as it consolidates its role on the

[22] See Chapter 6, Section IV.B.
[23] See also Chapter 3, Section III.B.i.

international stage and seeks to respond more effectively and coherently to global challenges.

This is the basic contribution of this thesis: to analyse the process of implementation of international law in the Irish legal system within this broader European Union context and thereby to provide a better understanding of the practical realities of that process. In short, as the EU consolidates its role, it will no longer be possible to study the implementation of international law in the Irish legal system without taking account of this significant EU dimension.

III. Implementation of International Law in the Irish Legal System: Understanding the "Constitutional Space"

A. The Inadequacy of Monism and Dualism

The implementation of international law in internal legal systems has been dominated by the doctrinal quarrel between monism and dualism.[24] As discussed in Chapter 1, every legal system can be regarded, strictly speaking, as adopting a dualist approach to international law in the sense that the internal status of a rule of international law ultimately depends on a rule of the internal legal system. However, in the context of national implementation, the labels of monism and dualism have generally been used in a flexible way, describing the mode of implementation of international law or, in other words, whether a rule takes effect within the internal legal system directly or requires positive implementing action. Using the labels in this manner, the Irish approach is considered dualist while the EU approach is considered monist. Yet, like most legal systems, the Irish and EU legal systems contain elements of both monism and dualism. For example, the Irish approach to custom may be considered monist and the EU approach to international judicial decisions dualist. The example of custom in the Irish legal system amply demonstrates how little there often is between monism and dualism when used as loose labels.[25] Once one looks behind the labels, it quickly becomes clear that they offer at best a superficial or partial description of a legal system's approach to the implementation of international law. Although international agreements may form part of the EU legal system without requiring positive implementing action, for example, this does not necessarily mean that they enjoy direct effect within that legal

[24] See generally Chapter 1, Section III.
[25] See Chapter 4, III.C.

system, as the case of the WTO Agreements makes clear.[26] Moreover, these labels do not capture the breadth of influence which may be exercised by international law, short of being directly given the force of law, as evidenced by the persuasive authority of international jurisprudence such as that of the ECHR, the indirect effect of non-implemented (in the Irish case) or non-directly-effective (in the EU case) international agreements.

More significantly, however, implementation of international law in the contemporary Irish legal system involves the interplay of at least three distinct legal systems: the international legal system, the EU legal system and the Irish legal system. When faced with this tripartite relationship, as in the context of Security Council resolutions or the European Convention of Human Rights, the labels of monism and dualism quickly become unstuck. Whatever utility they may have within the context of the relationship between international law and national law *simpliciter*, they offer little assistance in understanding the problems within a multi-level constitutional system, particularly that of the European Union where the boundaries between national and international have already been blurred in significant ways. This tripartite, 'triangular'[27] or 'trinitarian'[28] relationship gives rise to distinct issues. While constitutional pluralism has recently emerged as an important doctrinal attempt to understand this relationship, as discussed in Chapter 1, this doctrine does not, at least as currently formulated and at the current state of evolution of the international legal system, offer a satisfactory account of this relationship. Moreover, both the doctrinal history and the reality and the diversity of the practice of implementation strongly discourage the development of universalising principles to explain the implementation of international law within internal legal systems and indeed the relationship between international law and internal law more generally.[29] Accordingly, this conclusion does not seek to advocate or develop a new doctrine to replace monism and dualism. Instead, it seeks to re-focus the analysis in order to better understand the process of implementation of international law within this complex framework. In essence, it is suggested that the implementation of

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[26] See Chapter 3, Section IV.C.iii

[27] Wouters, Nollkaemper and de Wet eds, *The Europeanisation of International Law: the Status of International Law in the EU and its Member States* (TMC Asser Press, 2008), Introduction.

[28] Bethlehem, "International law, European Community law, National Law: Three Systems in Search of a Framework" in Koskennemi ed, *International Law Aspects of the European Union* (Kluwer, 1998).

[29] See Chapter 3, III.B.i. (describing the diverse legislative practice designed to give effect to international agreements); the jurisprudence on direct effect might be considered the EU counterpart to this: see Chapter 4, Section IV.C.

international law, even within the EU legal system, with its multi-level and evolving division of power, is at heart a constitutional process, albeit one which must be understood in broader terms than it has been understood to date. Thus, although, as was suggested in Chapter 1, the relationship between the EU and Member States' legal systems and the international legal system cannot properly be understood in constitutional pluralist terms, the international legal system nonetheless provides a bridge to the *internal* constitutional processes of the these legal systems.

B. The Constitutional Space for Implementation of International Law

How then must one understand the process of implementation of international law in the Irish legal system in the age of the European Union? It is suggested that it is necessary to go back to first principles in order to do so.

International law mandates neither monism nor dualism. In light of the internal diversity of international law, its subject-matter, form and scope, and the range of issues to which it gives rise within different internal legal systems, whether national or regional, the limited utility of these universalising doctrines is not surprising. Although States are bound to respect their international obligations and, where they do not do so, they may be held responsible as a matter of international law, international law as a general rule affords internal legal systems great freedom in determining how to give effect to its rules.[30] The measure of freedom varies across the broad and varied field of international obligations and has changed over time: some obligations expressly or implicitly necessitate implementation within internal legal systems while others may be intended to operate purely at the inter-State level and the boundary between political and legal obligations may be blurred; certain international regimes establish mechanisms to supervise the implementation of States' obligations while others rely on the traditional rules of international responsibility; in short, the mechanisms for the implementation of international law remain very much in a state of evolution. What international law affords to members of the international community is a *constitutional space* within which members of the international community are free to choose how to reconcile their international obligations with their core internal constitutional principles.[31] Approaches to the use

[30] See Chapter 1, Section IV.

[31] The term "constitutional space" has been employed in a number of different contexts none of which is akin to this proposed usage: see e.g. Tribe, "Essay: The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics" (1989) 103 *Harvard Law Review* 1. In the field of EU law, see e.g. Von Bogdandy, "Doctrine of Principles" (2003) *Jean Monnet Working Paper* 9/03. Of

of this constitutional space are as varied as the members of the international community themselves. The benefit of analysing the problems at the heart of this thesis in 'spatial' rather than monist, dualist or constitutional pluralist terms is that it focuses on the changing framework for the implementation of international law which is at the heart of this thesis.

What is of interest in the context of the present study, therefore, is the effect of the EU on Ireland's constitutional space for the implementation of international law. In essence, for the Irish legal system, as for the legal systems of all Member States, this constitutional space has been Europeanised. While part of this space remains within the exclusive domain of Member States, in many cases, the EU is now also an integral part of that constitutional space, sometimes independently and sometimes alongside or overlapping with Member States. In order to determine the state of this constitutional space, it is necessary to determine whether competence for the implementation of an international obligation remains with the Irish legal system or whether it has been transferred in whole or in part to the EU legal system. While the Lisbon Treaty has brought some clarity to this difficult area, it remains a complex question. Within the confines of this concluding chapter, it is not possible to delve further into what has been called "the often bewildering dynamic of competence".[32] However, what is clear is that, in practice, in many areas of shared competence, the determination of where competence lies in the implementation of an international norm will require a determination on the part of the European courts.[33]

Secondly, once the locus of competence is determined, it is possible to identify the express rules (where they exist) governing the implementation of international law within this constitutional space. In this respect, members of the international community may place more or less stringent restrictions on their constitutional space. In some cases, there are clear legal rules regulating this constitutional space. Thus, in the case of international agreements, depending on whether the implementation of an international agreement falls within the competence of the Irish or the EU legal system, it will be governed by Article 29.6 of the 1937 Constitution or by Article 216 TFEU respectively. However, these provisions, notwithstanding their clear terms, only tell part of the story. Many agreements, including mixed agreements, may fall between these provisions.

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course analogous phrases such as 'legal space' have often been employed in different senses in the EU context.

[32] Bethlehem, see note 28, at 172.

[33] See Chapter 2, Section IV.

Moreover, some international agreements, with important indirect or informal effects, are not necessarily captured by these express constitutional rules. Moreover, in respect of customary international law, and indeed the other sources of international law, there is little in the way of express constitutional regulation in the Irish and EU legal systems. The only potentially relevant provision of the Irish Constitution for custom, Article 29.3, does not provide a legal basis for, or determine the internal effect of, custom within the Irish legal system. In the EU Treaties too, there is no express regulation of the status or effect of custom. As a result, it has fallen to the courts to determine these issues. Finally, while the EU Treaties provide a procedure for implementation if certain circumstances are fulfilled, Security Council resolutions enjoy no independent legal status within the EU or Irish legal systems and their implementation is not otherwise governed by constitutional rules. Thus, the express constitutional rules provide quite limited guidance as to the regulation of the constitutional space.[34]

In order to determine the internal effects of international obligations falling outside the scope of those rules, it is therefore often necessary to situate the implementation of international law within the broader principles of the Irish and EU constitutional framework. In this framework, there are a number of broad elements which are of significance in the context of the constitutional space for the implementation of international law. First, it must be noted that respect for international law is itself a constitutional value within the Irish and EU legal systems. For its part, Article 3(5) of the Treaty on European Union provides that the EU shall contribute *inter alia* to "the strict observance and the development of international law". Article 29.3 of the Irish Constitution, while it may be legally redundant as a basis for the implementation of custom within the Irish legal system, nonetheless expresses a clear constitutional commitment to international law, which at the very least operates at the political level. While they may not directly determine questions of implementation, such expressions of general principle may also be considered to support tools which are employed to minimise or mitigate potential conflict between national and international law such as the presumption of compatibility or principle of consistent interpretation and the other indirect effects that may be recognised to

[34] This is something which has been commented upon by Kumm, "The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism In and Beyond the State" in Dunoff and Trachtman eds, *Ruling the World?: Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009), at 258. However, as discussed in Chapter 1, Kumm's proposed framework of analysis fails to address convincingly its relationship with express constitutional rules governing the reception of international law.

non-implemented or non-directly effective treaties.[35] Secondly, a central part of all constitutional systems is, of course, the division of power among the different organs of government. As the Irish legal system has become part of the wider EU legal system, its constitutional system has become more complex. Where once the institutional structure of government was concerned solely within the separation of powers between the Irish executive, legislative and judicial branches, it is now also concerned with the division of powers on the EU level, both horizontally between the EU institutions and vertically between the EU and Ireland. Thirdly, in the Irish and EU constitutions, fundamental rights are of paramount importance. Where once the fundamental rights protected by the Irish Constitution and specifically Articles 40 to 44, as interpreted by the superior courts, they must now be understood alongside the fundamental rights protected within the EU legal system. Moreover, both systems must be understood within the broader context of the ECHR.

Thus, respect for fundamental rights, for separation of powers or institutional balance, and for international law, all constitute constitutional values which shape the constitutional space for the implementation of international law. A balance must be struck between the international obligation in question and other relevant constitutional values. In many cases, these values are reconcilable and mutually reinforcing in the context of such balancing. In other cases, however, there may be a clear conflict between an international obligation and one or more of these values. In this context, the political dimension of the constitutional space comes into play.

One of the critical elements of the idea of a 'constitutional space' is that such a space has political as well as legal dimensions and that the boundaries between the political and the legal are fluid. One striking feature of the study of the implementation of international law within internal legal systems is the sidelining of the political dimension of the process. Yet, implementation of international law is not a purely legal process and is not always or inevitably reducible to purely legal rules. In the first instance, this political dimension may be evident in the constitutional rules or practice governing implementation of international law. In Ireland, this political dimension is entrenched in Article 29.6 which requires positive legal action in order to give effect within Irish law to international agreements concluded by the executive on behalf of the State, an important democratic safeguard within the constitutional scheme of government. It is also evident, albeit more obliquely, in the approach to custom insofar as the Irish courts show deference to the political organs

[35] Chapter 3, Section III.C.2 and Section IV.C.

by applying a doctrine of justiciability and in the implementation of international judicial decisions which generally requires action on the part of the political organs. In the EU system, the political dimension can be detected, if often subtly, in the implementation of international agreements. Although the European courts undoubtedly play the central role in determining the effect of international agreements within the EU legal system, their decisions nonetheless recognise, rhetorically at least, that this is primarily a matter for the political organ and political factors have featured strongly in some of their decisions on direct effect. In the case of agreements concluded under the CFSP, judicial review is almost entirely excluded. Similarly, in respect of customary international law, the invocation of notions of justiciability or limited judicial review in the Irish and EU legal systems reflects the difficulties faced by courts in grappling with legal rules that may primarily operate at the inter-State level or that lack the specificity required for application within internal legal systems. In the case of Security Council resolutions, the structure of the European Treaties is such that a political decision is a preliminary to implementing action within the EU, something that is also generally required for the implementation of international judicial decisions.

The political dimension is also evident in the influence of international legal constraints on domestic political actors, even where they may not be directly enforceable in internal law. Allegations of violations of customary international law, or of international agreements, or adverse decisions of international tribunals, for example, may not only call into question the State's or the Union's international responsibility, they may also serve as a trigger for internal political action and reform. Moreover, where an internal legal system is faced with an irreconcilable conflict between international law and internal law, the options for resolving this conflict lie first and foremost with the political organs of government: for example, making a reservation to an international agreement; where this is not possible, non-ratification or, in the case of agreements already concluded, termination or renunciation; or, where an agreement must be ratified in the face of clear constitutional conflict, the holding of a referendum in the case of the Irish constitution or amendment of the Treaties in the case of the EU.

This sketch of the constitutional space within which international law must be implemented does not seek to provide definitive guidance on how particular obligations are to be implemented within the Irish or EU legal systems or how the balance is to be struck between competing constitutional values in concrete cases. Its

aim is merely to pinpoint certain features of this constitutional process which have sometimes been neglected in the study of this topic to date. In so doing, however, it may set the foundations for the development of coherent principles in this area.

One feature which emerges from this sketch is that the Europeanisation of the process of implementation of international law also represents in many respects a legalisation or 'judicialisation' of this constitutional space, at the very least insofar as international agreements are concerned. Where in the Irish legal system, Article 29.6 leaves it to the political organs, and specifically the legislative organ, to determine whether, and how, to give effect to an international agreement in Irish law, in the system established by the European Treaties and the practice that has developed thereunder, these questions fall to be decided almost exclusively by the judicial organ, namely the European Court of Justice. Insofar as other sources of international law – such as custom and UN Security Council resolutions – are also conferred with the characteristics of EU law, a similar trend can also be detected to varying degrees.

A related but broader feature which emerges from this sketch is a culture of openness to international law. If the choice of mechanisms for implementing international rules within internal legal systems is "the acid test for establishing to what extent States are open to international law",[36] as Cassese suggests, then it may be argued that the Europeanisation of the constitutional space has resulted in a greater openness on the part of the Irish legal system to international law.

Again, this is certainly the case with respect to international agreements. As already outlined, the Irish and the EU legal systems approach the implementation of international agreements from fundamentally different starting points. Whereas Article 29.6 excludes international agreements from enjoying internal effect in the absence of positive legislative action, the European Treaties, as interpreted by the Court of Justice, consider such agreements to form part of the EU legal order and to bind the institutions and Member States upon their conclusion. Moreover, extending the approach adopted to its own primary and secondary law, the Court has been generous in granting direct effect to such agreements. Similarly, in respect of customary international law, the Court has not only recognised that this forms part of the EU legal order but also that it prevails over inconsistent secondary EU law and national law. Even in the case of Security Council resolutions – which do not form part of the EU legal order *per se*, but the terms of which are often given effect to

[36] See Cassese, *International Law* (2nd ed., Oxford University Press, 2005), at 234, quoted in Chapter 1.

through EU regulations – enjoy stronger effect within the Irish legal system than they would if simply given effect through Irish law. By extending the effect of EU law – in particular, direct applicability (and often direct effect) and supremacy – to other sources of international law, the EU has allowed this law to penetrate more deeply into the legal systems of Member States.

More broadly, as with the Irish political system, the experience of the Irish legal system with the EU and its legal system has itself helped to create a culture of greater openness to external sources of law, such as international law. This takes a tangible form in, for example, those members of the Irish judiciary who have also served on the European courts, but it is evident throughout the Irish legal profession. Despite what has been quite a mixed attitude to international law generally, the Irish courts have, with rare exception,[37] been extremely receptive to the law of European Union. Consequently, when international law comes into the Irish legal system in the form of EU law (Security Council resolutions[38] and the Supreme Court's approach to the Europe Agreements in *G.A.G.*[39] being good examples), the Irish courts have been similarly receptive, notwithstanding that the process by which such law takes effect is much more far-removed from domestic processes and powers than is, for example, the case in international agreements ratified and implemented directly by the Irish Government and Parliament. Recent scholarship has highlighted the importance of the prevailing legal and political cultures to the implementation of international law within internal legal systems.[40] This 'Europeanisation' of the culture of the Irish legal system through EU law, as well as through the ECHR and its jurisprudence, has resulted in a greater familiarity with, and openness to, international law generally.[41]

It is important not to overstate the extent of this "opening" effect of EU membership on the implementation of international law. As we have seen, despite the many differences of approach of the Irish and EU legal systems, there are also

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[37] The controversy in *SPUC v. Grogan* [1989] IR 753 and the judgment of Walsh J. in that case is often cited in this regard: see e.g. Phelan, *Revolt or Revolution? The Constitutional Boundaries of the European Union* (Round Hall, 1997).

[38] See Chapter 5.

[39] *G.A.G. v Minister for Justice* [2003] 3 IR 442.

[40] See e.g. Knop, "Here and There: International Law in Domestic Courts" (2000) 32 *NYU JILP* 501; Higgins, "Dualism in the Face of a Changing Legal Culture" in Andenas and Fairgrieve eds, *Judicial Review in International Perspective, Liber Amicorum in Honour of Lord Slynn of Hadley, Vol. II* (Kluwer, 2000), at 9; and, for an Irish perspective, de Londras, "Dualism, Domestic Courts, and the Rule of International Law" in Sellers and Tadeusz eds, *The Rule of Law in Comparative Perspective* (Springer, 2010), at 217.

[41] The term "Europeanisation" has gained wide usage particularly in political science literature. More recently, it has gained prominence in the legal literature, including in the field of international law, see generally Wouters, Nollkaemper and de Wet (eds.), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States* (T.M.C. Asser Press, 2008), at 3.

many areas of convergence. In respect of international agreements, for example, although the Court of Justice may recognise these as forming part of the EU legal order, it may nonetheless refuse to give direct effect to them in certain cases (such as the WTO Agreements and UNCLOS), just as the Irish courts refuse to give effect to agreements not implemented in accordance with Article 29.6. Similarly, in respect of custom, while both systems may recognise it as forming part of the law, they nonetheless place limits on the circumstances in which it may be applied. More broadly, in light of its longstanding approach to the GATT and WTO Agreements and more recently to DSU reports as well as Security Council resolutions in *Kadi*,[42] it might be suggested that the EU, or at least the Court of Justice, only gives effect to international law when it suits it to do so. While there is undoubtedly some truth in this suggestion, it is a common charge against legal systems which must considered in light of the complexity of the process of implementation of international law as a whole. Despite these reservations and recent expressions of concern about *Kadi* signalling a change of approach,[43] it is difficult to deny that EU membership has, on the whole, led to a culture of greater openness to international law.

IV. Conclusion

International law generally, and its implementation in particular, have received little attention to date in Irish legal scholarship. As the influence of the European Union in this area has expanded, the traditional conceptions of the process of implementation of international law in Ireland have become more and more outdated and incomplete, if not inaccurate. The interaction between Irish, European and international law is complex and its implications remain, in important respects, to be fully worked out. However, it is clear that the implementation of international law within the Irish legal system can no longer be analysed without having regard to its significant, and ever-increasing, European dimension.

In conclusion, as the analysis of the individual sources of international law has clearly demonstrated, EU membership has radically changed the process of implementation of international law within the Irish legal system. While this is probably true of all Member States of the European Union, its effect is particularly

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[42] Joined Cases C-402/05P and C-415/05P *Kadi and Al Barakaat* [2008] ECR I-6351.

[43] See e.g. de Búrca, "The European Court of Justice and the International Legal Order After *Kadi*" (2010) 51 *Harvard International Law Journal* 1,

pronounced in systems, such as Ireland's, which have traditionally adopted a dualist approach to international law. The labels of monism and dualism no longer offer an accurate guide or adequate explanation of the process of implementation of international law within the legal systems of EU Member States.

As international law increasingly penetrates EU legal systems and comes into contact or conflict with other core constitutional principles, it is therefore important to develop a better understanding of the process of implementation of international law. Like European Union law itself, international law is both more effective and more legitimate when it is given effect in a manner which is consistent with its members' core constitutional values.

To this end, international law allows internal legal systems a constitutional space within which they can balance their international obligations and their internal constitutional values. Reflecting the evolving relationship between Irish, EU and international legal systems, and the porous boundaries between legal and political dimensions of this relationship, this constitutional space is complex, multifaceted and dynamic in character. As the relationship between these legal systems continues to develop, so too will the character of this constitutional space in which all three interact. It is suggested that it is within this framework that the process of implementation of international law can henceforth be understood in the Irish legal system and that the search for coherent principles can be pursued.

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